Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

PAUL PALMIERI,

Petitioner,

-against-

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did respondents, as punishment for his refusal to allow a violation of his Fourth Amendment rights, unreasonably deny petitioner a wetlands permit to build an extension of an existing dock that protrudes approximately 92 feet away from his yard and into a bay because petitioner refused to give his consent to a warrantless pre-permit inspection of his home, deck, backyard fencing, bulkhead, dock and two boat lifts?

2. Should the "special needs" test be expanded to permit a governmental agency to deny a private property owner his right against unreasonable searches, seizures, and to be secure in his property, as protected by the Fourth Amendment to the United States Constitution, under circumstances where the governmental agency seeks access to private property as part of a construction permit process, not an emergency criminal investigation or prevention?

3. Should all private owners of waterfront property be stripped of their Fourth Amendment right against unreasonable searches, seizures and to be secure in their property because their rear property faces a body of water?

4. Did respondents, as punishment for petitioner's refusal to allow a violation of his Fourth Amendment rights, unreasonably refuse to conduct a pre-permit inspection of the area adjacent to, and beneath, an existing dock that protrudes 92 feet away from petitioner's yard and into the bay using a boat, a

QUESTIONS PRESENTED FOR REVIEW (CONTINUED)

method which had been used previously during a pre-permit inspection of petitioner's prior tidal wetlands' permit application and which is the only reasonable way of inspecting the area in question?

5. Could respondents even conduct a warrantless pre-permit inspection, while on petitioner's property, of an area in a bay adjacent to, and beneath, an existing dock that protrudes 92 feet away from petitioner's yard?

6. Was respondents' denial of petitioner's tidal wetlands' permit application, as punishment for his refusal to allow a violation of his Fourth Amendment Rights, upon the ground that petitioner refused to give his consent to a pre-permit warrantless inspection of his property and the area adjacent to, and beneath, an existing dock that protrudes 92 feet away from his yard and into the bay, a violation of petitioner's right against unreasonable search and seizure under the Fourth Amendment to the United States Constitution?

7. Assuming that respondents demonstrated a "special need" to enter petitioner's property, did such need constitute a constitutionally acceptable exception to plaintiff's right not to be subjected to an unreasonable search and seizure under the Fourth Amendment to the United States Constitution?

QUESTIONS PRESENTED FOR REVIEW (CONTINUED)

8. Is a warrantless pre-permit inspection during which representatives of a governmental agency walk through closed gates, across the front yard, side yard, and entire length of the back yard of petitioner's private residential property a minimal intrusion?

9. Was a warrantless pre-permit inspection on petitioner's private residential property a matter of governmental interest?

10. Did the respondent governmental agency demonstrate disregard for its own rules and the rule of law by not deeming petitioner's application for a wetlands' permit complete pursuant to ECL §70-0109(1)(a) and (b) and 6 NYCRR §621.5 (b)(2) and by failing to send petitioner its first notice of incomplete application within 15 days of its receipt of petitioner's permit application as the afore-mentioned rules require?

11. Did the respondent government agency demonstrate disregard for its own rules and for the rule of law by not deeming petitioner's application for a wetlands' permit complete pursuant to ECL §70-0109(1)(d) and by failing to send petitioner its second notice of incomplete application within 15 days of its receipt of additional information from petitioner as the afore-mentioned rules require?

LIST OF PARTIES

The parties are the petitioner, Paul Palmieri, and the respondents, the New York State Department of Environmental Conservation hereafter ("DEC"), Erin M. Crotty, Commissioner, and Molly T. McBride, Administrative Law Judge.

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OPINIONS BELOW

The opinion of the Court of Appeals, State of New York, the court below, is reported at 2006 N.Y. LEXIS 3587 (November 21, 2006); and the opinion of the Appellate Division of State Supreme Court, Second Department, is reported at 31 A.D.3d 645 (2d Dept. 2006). The opinion of the Supreme Court of the State of New York, County of Suffolk, is not reported.

DATE JUDGMENT ENTERED

The judgment of the Supreme Court of the State of New York, County of Suffolk, which is dated July 25, 2003, was entered on August 8, 2003.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. Section 1257.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The constitutional provision involved is the Fourth Amendment to the U.S. Constitution which provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

This is an appeal from a decision and order dated and entered on November 21, 2006 of the Court of Appeals of the State of New York denying petitioner's motion for leave to appeal an order of the Appellate Division, Second Department, dated and entered in the office of the Clerk of the Appellate Division on July 18, 2006, holding that (1) under the circumstances of this case, the *nisi prius* court properly directed an administrative hearing on the issue of whether an inspection of petitioner's property was reasonably necessary; (2) the Fourth Amendment to the United States Constitution does not bar a warrantless inspection of his premises; (3) a request by respondents for an on-site inspection of the wetlands and adjacent areas on his property, in order to review the accuracy and impact of petitioner's permit application, fell within the special needs exception to the Fourth Amendment's warrant requirement; (4) in this instance, the state's interest in protecting wetlands is strong; (5) petitioner's expectation of privacy was diminished by the fact that his yard was open and exposed to the Great South Bay, that he applied for a permit to build in tidal wetlands, that he had previously consented to periodic inspections, and that the inspection would be a minimal intrusion; and (6) petitioner's remaining contentions were without merit; and affirmed the Judgment dated July 25, 2003 and entered on August 8, 2003 of the Supreme Court of Suffolk County (Baisley, J.) and undated Memorandum Decision, which Judgment and Memorandum Decision granted the petition to the extent that petitioner was held to be entitled to an adjudicatory hearing pursuant to 6 NYCRR §621.7(f), otherwise denied the petition; and determined that petitioner would have the burden at such hearing of demonstrating that respondent's demand for an on-site inspection of petitioner's

property is not reasonably necessary in order to evaluate petitioner's application for a wetland's permit (6 NYCRR §624.9(b)(1)).

The July 18, 2006 decision and order of the Appellate Division, Second Department, provides in pertinent part as follows:

> "The Supreme Court, in effect, determined that the petitioner's wetlands permit application was complete. However, the fact that an application is complete does not preclude the Department of Environmental Conservation (hereinafter the DEC) from requesting supplemental information, including an on-site inspection, during the post-completion review of an application (see 6 NYCRR 621.1[c], 621.7[f] and 621.15[b]; *Matter of Benlevi Obedian & Benlevi v. New York State Dept. of Envtl. Conservation*, 144 AD2d 358, 361; *Matter of Atlantic Cement Co. v. Williams*, 129 AD2d 84, 90). Under the circumstances of this case, the Supreme Court properly directed an [*2] administrative hearing on the issue of whether an inspection of the petitioner's property was reasonably necessary.
>
> "Contrary to the petitioner's contention, the Fourth Amendment to the United States Constitution does not bar a warrantless inspection of his premises (see *Palmieri v. Lynch*, 392 F3d 73, *cert denied* 126 S Ct 424; see also *Vernonia School Dist. 47J v. Acton*, 515 US 646; *Matter of Thompson v. Department of Envtl. Conservation of State of N.Y.*, 132 AD2d 665). A request by the DEC for an on-site inspection of the wetlands and adjacent areas on his property, in order

to review the accuracy and impact of the petitioner's permit application, fell within the special needs exception to the Fourth Amendment's warrant requirement (see *Palmieri v. Lynch, supra*). In this instance, the state's interest in protecting wetlands is strong. Moreover, the petitioner's expectation of privacy was diminished by the fact that his yard was open and exposed to the Great South Bay, that he applied for a permit to build in tidal wetlands, that he had previously consented to periodic inspections, and that the inspection would be a minimal intrusion (*id.; see also Vernonia School Dist. 47J v. Acton, supra; Matter of Thompson v. Department of Envtl. Conservation of State of New York, supra*).

"The petitioner's remaining contentions are without merit (*see Matter of Northern Metro. Residential Healthcare Facility v. Novello*, 24 AD3d 1069, n 1; *DiCarlo v. City of New York*, 286 AD2d 363, 365; *Matter of Calm Lake Dev. v. Town Bd. of Town of Farmington*, 213 AD2d 979)."

In a companion case, argued in, and decided by the Appellate Division, Second Department, on the same day[1]; decided by the Court of Appeals of the State of New York, on the same day, for which review is being sought in a petition for a writ of certiorari that will be submitted to this

---

1. Reported as *In the Matter of Paul Palmieri, appellant, v. New York State Department of Environmental Conservation respondent*, 2006 NY Slip Op 5794; 2006 N.Y. App. Div. LEXIS 9379 under Appellate Division Docket No. 2005-02686; Suffolk County Index No. 13500/04.

Court on the same day as the within petition, the Appellate Division, Second Department, ruled as follows:

> "In a proceeding pursuant to CPLR article 78 to review a determination of the New York State Department of Environmental Conservation that an on-site inspection of the wetlands and adjacent areas on the petitioner's property was reasonably necessary for the review of his application for a permit to extend his dock pursuant to Environmental Conservation Law articles 15 and 25, and that his application was denied unless and until he allowed the inspection, the petitioner appeals, as limited by his brief, from so much of an order and judgment (one paper) of the Supreme Court, Suffolk County (Baisley.), dated January 5, 2005, as granted that branch of the respondent's motion which was to dismiss the petition as time-barred, denied that branch of his cross-motion which was for leave to extend the time to personally serve the respondent, and dismissed the proceeding.
>
> "ORDERED that the order and judgment is affirmed insofar as appealed from, with costs.
>
> "Contrary to the petitioner's contention, the Supreme Court properly dismissed the petition as time-barred. The Supreme Court correctly applied the 30-day limitations period in ECL 25-0404 and held that the petition, filed 57 days after the determination of the Commissioner of the State of New York Department of Environmental Conservation (hereinafter the DEC), was untimely (see *Matter of Oak Is. Beach Assn. v. Flacke*, 96 A.D.2d 841, 465 N.Y.S.2d 596).

"Furthermore, the petitioner offered no good cause for his delay in serving the DEC, and that branch of his cross motion which was for leave to extend the time for service was made over three months after his first attempt at service. Accordingly, the Supreme Court providently exercised its discretion in denying that branch of the cross motion (see *Matter of Saltzman v. Board of Appeals of Vil. of Roslyn*, 26 A.D.3d 505, 506, 811 N.Y.S.2d 99; *Colon v. Bailey*, 26 A.D.3d 454, 455-456, 810 N.Y.S.2d 511).

"In light of our determination, we need not reach the petitioner's remaining contentions.

"FLORIO, J.P., CRANE, RITTER and FISHER, JJ., concur."

Petitioner's Article 78 proceeding arose out of the respondents' denial of his application for a tidal wetlands' permit authorizing construction of an extension to an existing dock presently protruding approximately 92 feet into the Great South Bay.

In 1991, petitioner applied for, and was granted, a tidal wetlands' permit for the reconstruction of his bulkhead and the construction of a 52 foot fixed pier with additional pilings and two boat lifts. Following construction of these improvements, in January of 1993, petitioner applied for another tidal wetlands' permit to extend his existing 52 foot dock an additional 110 feet and to add two more boat lifts. Although that permit application was denied by the DEC on November 4, 1993, following petitioner's request for an administrative hearing, a settlement was reached wherein the DEC agreed to issue petitioner a permit for a dock extension

of 40 feet and for the construction of an additional boat lift after it had conducted a pre-permit inspection by boat of an area in the Great South Bay behind petitioner's property in the area adjacent to and beneath petitioner's then existing dock.

Petitioner submitted another application to the DEC for a wetlands' permit in May of 1999, seeking to extend his 92 foot dock by 50 feet and to add another boat lift. In a letter sent to petitioner dated April 7, 2000 by Mark C. Carrara, its Deputy Permit Administrator, the DEC acknowledged that it had received petitioner's application for a wetlands' permit "on June 7, 1999". Approximately 36 days later, the DEC sent petitioner its first Notice of Incomplete Application dated July 13, 1999, informing petitioner that his application was incomplete in that he had failed to submit photographs, project plans, a location map, a recent survey, proof that the proposed dock extension and boat lift were reasonable and necessary and information as to how many boats would be moored. After it received petitioner's photographs, project plans and a location map on January 20, 2000, the DEC waited almost three months before sending petitioner a second "Notice of Incomplete Application" dated March 13, 2000 indicating that petitioner's application was still incomplete as he had failed to submit a recent survey of the project site. Thereafter, by letter dated April 7, 2000, the DEC informed petitioner that his application was complete except for a pre-permit inspection on his property. When petitioner refused to give the DEC his consent to conduct a pre-permit inspection on his property, insisting instead that the DEC conduct its pre-permit inspection of the bottom of the bay adjacent to, and beneath, the proposed location of the dock extension (approximately 92 feet into the bay) by boat, a method which

the DEC had used in performing its prior pre-permit inspections of the bottom of the bay adjacent to, and beneath, petitioner's present dock, the DEC denied his wetlands' permit application by "Notice of Permit Denial" dated July 7, 2000 upon the ground that petitioner failed to give his consent to a pre-permit inspection on his property. The Notice of Permit Denial further informed petitioner that he had a right to request an adjudicatory hearing pursuant to 6 NYCRR 621.7(f), which he did by letter dated August 3, 2000.

The hearing, which was initially scheduled for March 21, 2001, was adjourned to June 25, 2001 due to DEC staff unavailability. When neither petitioner nor his attorney appeared on the adjourned date of the hearing, the DEC moved for administrative judicial intervention contending that petitioner's failure to appear at the re-scheduled hearing should be considered as an abandonment or withdrawal of his request for a hearing or a default; or alternatively, that the DEC's denial of petitioner's permit application should be affirmed without the need for an adjudicatory hearing upon the ground that controlling administrative case law precluded a hearing until petitioner consented to a pre-permit inspection on his property. Petitioner opposed the motion upon the grounds that the DEC failed to confirm the adjourned hearing date and to provide proof of publication of the notice of hearing. Petitioner's attorney, in a letter dated April 27, 2000, contended that the DEC could conduct a review of petitioner's permit application in a manner less intrusive than a pre-permit inspection on his property, particularly since there was an alternative method of inspection, namely by boat, which the DEC had used in performing prior inspections relating to petitioner's wetlands' permit applications of the bottom of the bay,

adjacent to, and beneath, petitioner's present dock. Petitioner's attorney further contended that conditioning a permit upon a non-consensual pre-permit inspection on petitioner's property violated petitioner's rights under the Fourth Amendment to the U.S. Constitution.

In an undated decision (hereafter the "McBride Ruling") rendered on the DEC's motion by Administrative Law Judge Molly McBride (hereafter "ALJ"), the ALJ ruled that there was no confirmation that petitioner's attorney saw the notice of the adjourned hearing and determined "Frankly, scheduling errors occur and such a severe penalty as requested by [DEC] Staff is not warranted here". With respect to the DEC's alternate request for relief, the ALJ determined that the DEC could not determine whether the application met the standards for permit issuance unless it was permitted to conduct a pre-permit inspection on petitioner's property; and that if it could not be determined whether the standards had been met, petitioner's permit application could not be deemed complete. The ALJ recommended that the Notice of Permit Denial be vacated and replaced with a Notice of Incomplete Application; ruled that petitioner's request for a hearing be treated as void since such a request could not be made in response to a Notice of Incomplete Application; and concluded that there could be no further processing of petitioner's application until it was complete.

In a ruling dated February 1, 2002 (hereafter the "Commissioner's Ruling"), the Commissioner of the DEC (Erin M. Crotty), adopted the decision of the ALJ commenting as follows:

"I find that the Applicant's [petitioner] tidal wetland application under review must be deemed incomplete for the purposes of permit processing under the Department's Uniform Procedures, 6 NYCRR part 621. The Applicant's denial of access to his property prevented Department Staff from evaluating the on-site conditions and the proposed project. The ability to gather such information is necessary to make the determination that the permit application is complete. The applicant's actions effectively relieves Department Staff from taking any further action on the permit application until access to the site and site information is available for Staffs review. Further, I am determining that the Applicant's request for hearing on its [sic.] proposed project is void until such time as the site access and the necessary information is made part of the permit application. Thereafter, if and when said information is supplied and Staffs redetermination is to deny the proposed project, then the applicant will be afforded a hearing on Staffs denial of the requested permit".

Thereafter, petitioner commenced an Article 78 proceeding by service of a notice of petition and verified petition; and subsequently served an amended verified petition. In his amended petition, petitioner sought a judgment annulling and vacating the Commissioner's Ruling to the extent that it affirmed those portions of the McBride Ruling determining that petitioner's application was incomplete and that petitioner's request for a hearing was void; and also sought review of the McBride Ruling

contending that (A) pursuant to 6 NYCRR 621.4(K), a pre-permit inspection on petitioner's property by a DEC staff member is not one of the requirements for a complete permit application, although petitioner had no objection to a pre-permit inspection on petitioner's property by a private environmental consultant, which is expressly authorized by 6 NYCRR 621.4(K)(iii)), (B) the McBride decision violated the provisions of ECL 70-0109(1)(a) and (b) and 6 NYCRR 621.5(b) which deem an application complete unless the DEC mails a written notice that the application is incomplete within 15 calendar days of its receipt of the permit application, (C) the McBride Ruling improperly relied on an Interim Decision of the Deputy Commissioner of the DEC dated November 6, 2000 (the "*Bath Storage* decision") in holding that an adjudicatory hearing is not available for review of a permit denial based on the incompleteness of the application, and (D) the DEC's conditioning of the issuance of a permit upon its receipt of petitioner's consent to a pre-permit inspection on petitioner's property violated petitioner's right against unreasonable search and seizure under the Fourth Amendment to the United States Constitution.

Petitioner further contended that his property does not come within the DEC's wetland permit jurisdiction pursuant to ECL 15-0505(1) and 6 NYCRR 608.5; and that his permit application should be deemed approved on the basis of the five day demand provisions of 6 NYCRR 621.9(b) and (c). The *nisi prius* court refused to consider the latter contention upon the ground that it had not been raised at the administrative level in reliance upon the cases of *Ambry v.*

Bd. of Trustees of N.Y. City Fire Department, 298 A.D.2d 582 (2d Dept. 2002); and *Fry v. Village of Tarrytown*, 89 N.Y.2d 714 (1997)).

The *nisi prius* court determined that petitioner's contention that the DEC's conditioning of the issuance of a permit upon its receipt of petitioner's consent to a pre-permit inspection on petitioner's property violated petitioner's right against unreasonable search and seizure under the Fourth Amendment to the United States Constitution was without merit; and held that whenever the DEC can demonstrate a "reasonable need" for the scientific information obtainable through a pre-permit inspection, such inspection would constitute a valid condition to a wetlands's permit in reliance upon the case of *Thompson v. Department of Environmental Conservation*, 132 A.D.2d 665 (2d Dept. 1987) app. den. 71 N.Y.2d 803 (1988) and 6 NYCRR 621.15(b)).

The *nisi prius* court eschewed such cases as *Stender v. Albany*, 188 A.D.2d 986 (3d Dept. 1992) app. dis. 81 N.Y.2d 1006 (1993); and *Brookhaven v. Ronkonkoma Realty Corp.*, 154 A.D.2d 665 (2d Dept. 1989) based upon its opinion that a pre-permit inspection on petitioner's property constituted a "minimal intrusion" upon the property; that petitioner had a "diminished expectation of privacy" in his property and that a pre-permit inspection on petitioner's property was a matter of governmental interest in reliance upon ECL 25-0102, 6 NYCRR 661.1, 661.9(b); and *Board of Education v. Earls*, 536 U.S. 822, 829, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002)), which rulings petitioner disputed in his

appeals to the Appellate Division of State Supreme Court, Second Department, and New York State Court of Appeals.

Petitioner also challenged that part of the Commissioner's Ruling that relieved the DEC from any further action including a hearing on petitioner's application until he complied with its demand for a pre-permit inspection on his property.

In reaching its determination, the *nisi prius* court expressly found that since the Commissioner adopted the McBride Ruling as its own, it was constrained to review the findings in that ruling in order to determine its efficacy.

The *nisi prius* court found that the record established that initially the DEC had afforded petitioner the right to a public adjudicatory hearing in the Notice of Permit Denial but that such hearing was adjourned because of the DEC's inability to proceed. Although neither the petitioner nor his attorney appeared on the adjourned date of that hearing, the ALJ subsequently determined that petitioner should not be deprived of his right to an adjudicatory hearing based merely upon this ground.

The *nisi prius* court found that the ALJ, by characterizing petitioner's application as incomplete, determined that no further action, including the adjudicatory hearing, would be taken, that the ALJ's determination constituted error and that petitioner should have been afforded the opportunity at an adjudicatory hearing to demonstrate whether the DEC's request for a pre-permit

inspection on petitioner's property was reasonable and necessary. Petitioner contends that under no circumstances can the DEC condition the grant of a permit application upon a non-consensual pre-permit inspection on petitioner's property.

Although following the submission of his tidal wetlands' permit application to the DEC, petitioner was served with at least two "incomplete notices" which did not require a pre-permit inspection on petitioner's property, nevertheless, the *nisi prius* court determined that notwithstanding that 6 NYCRR 661.12(a)(1), 6 NYCRR 621.3 and 6 NYCRR 621.4(k) do not specifically provide for a pre-permit inspection as a prerequisite for a complete application, the DEC had the authority to require pre-permit inspections based upon its general authority to request supplemental information during the course of permit review to enable it to make the findings and determinations required by law, citing 6 NYCRR 621.1(d), additional information "which is reasonably necessary to make any findings or determinations required by law", citing 6 NYCRR 621.15(b) and that, the NYSDEC could fix a date for receipt of such additional information and if it was not timely submitted it "may be grounds for denial of the application", citing 6 NYCRR 621.15(b).

The *nisi prius* court further found that in this case, petitioner's application could be denied upon the ground that without a pre-permit inspection on petitioner's property, the DEC could not determine whether or not petitioner's proposal complied with the standards for permit issuance.

The *nisi prius* court ruled that petitioner, upon his request therefor pursuant to 6 NYCRR 621.7(f), was entitled to an adjudicatory hearing on whether or not the DEC's demand for a pre-permit inspection on petitioner's property was "reasonably necessary" to make the required findings or determinations with regard to petitioner's permit application; that the ALJ's reliance on the *Bath Storage* decision was misplaced; and that petitioner was entitled to an adjudicatory hearing pursuant to 6 NYCRR 621.7(f) at which petitioner would have the burden of demonstrating that the DEC's demand for a pre-permit inspection on petitioner's property was not reasonably necessary in order to evaluate his application for a wetland's permit, but the petition was otherwise denied.

In his appeals to the Appellate Division of New York State Supreme Court, Second Department, and the New York State Court of Appeals, the petitioner contended, *inter alia*, that the *nisi prius* court's rulings were erroneous as a matter of law because no governmental agency may condition the grant of a permit application upon a non-consensual pre-permit inspection on private residential property irrespective of whether or not it was reasonably necessary in order to evaluate an application for a permit.

In a letter sent to petitioner dated April 7, 2000 by Mark C. Carrara, its Deputy Permit Administrator, the DEC admitted that it had received petitioner's application for a tidal wetlands' permit "on June 7, 1999". Approximately 36 days later, the DEC sent petitioner a Notice of Incomplete Application dated July 13, 1999 informing petitioner that his

application was incomplete in that he was required to submit photographs, project plans, a location map, a recent survey, proof that the proposed dock extension and boat lift were reasonable and necessary and information as to how many boats would be moored. After it received petitioner's photographs, project plans and a location map on January 20, 2000, the DEC waited almost three months before sending petitioner a second "Notice of Incomplete Application" dated March 13, 2000 indicating that petitioner's application was still incomplete as he had failed to submit a recent survey of the project site. Thereafter, by letter dated April 7, 2000, the DEC informed petitioner that his application was complete except for a pre-permit inspection on his property. Following petitioner's refusal to give his consent to a pre-permit inspection on his property, the DEC denied his wetlands' permit application by "Notice of Permit Denial" dated July 7, 2000 upon the ground that petitioner failed to give his consent to a pre-permit inspection on his property. The Notice of Permit Denial further informed petitioner that he had a right to request a public hearing pursuant to 6 NYCRR 621.7(f) which he did by letter dated August 3, 2000.

LEGAL ARGUMENT

Subdivision (1) of ECL 70-0109 provides in relevant part as follows:

> "(a) On or before fifteen calendar days after the receipt of an application for a permit which has been filed in a manner and in a form prescribed by the department, the department shall mail written notice

to the applicant of its determination whether or not the application is complete.

"(b) If the department fails to mail written notice to an applicant of its determination whether or not an application is complete within such fifteen calendar day period, the application shall be deemed complete."

The regulations of the DEC provide in relevant part at 6 NYCRR 621.5 as follows: "(b) The Department shall mail notice of its determination of completeness or incompleteness to the applicant . . . (2) . . . on or before 15 calendar days after receipt of the application"; and "(f) If the department fails to mail notice of its determination of completeness or incompleteness to the applicant within the time limit specified above, the application shall be deemed complete".

The intent of the legislature in enacting ECL 70-0109 was "to establish reasonable time periods for administrative agency action on permits" (ECL 70-0103); and "in order to set in motion the timetable set forth in the uniform procedures and compel that the permit application continue to be processed" (*Heimbach v. Commisioner*, 136 Misc.2d 1 (Albany Co. 1987). Any other construction would result in permit applications being held in administrative limbo, neither denied, granted, or processed, as occurred in the case at bar (*Id.*).

In *Tayntor v. NYS Department of Environmental Conservation*, 130 A.D.2d 571 (2d Dept. 1987), the court found that a letter mailed by the DEC on August 17, 1983 within 15 days of its receipt of a permit application received

on August 2, 1983 was mailed timely. However, in *Benlevi v. NYS Department of Environmental Conservation*, 144 A.D.2d 358 (2d Dept. 1988) appeal dismissed 74 N.Y.2d 650 (1989) the court ruled that an application for a permit must be deemed complete because the DEC had failed to send the petitioners a notice of incomplete application within 15 days of the agency's receipt of the permit application.

In the case at bar, after receiving petitioner's permit application on June 7, 1999, the DEC waited until July 13, 1999 before sending petitioner its Notice of Incomplete Application, a period of 36 days. Therefore, based upon ECL 70-0109 and 6 NYCRR §621.5, petitioner's permit application should have been deemed complete.

As mentioned above, the DEC received petitioner's photographs, project plans and a location map on January 20, 2000 but waited until March 13, 2000 to send him its second Notice of Incomplete Application. Assuming the subsequent submission by petitioner of photographs, project plans and a location map constituted a re-submission of the application or the submission of additional information, ECL §70-0109(1)(d) provides that such submission "shall commence a new fifteen calendar day period for department review of the additional information for purposes of determining completeness". Therefore, the DEC failed to observe the 15 day period for mailing petitioner written notice of his incomplete application Twice!

If petitioner's permit application was deemed to be complete before the DEC requested a pre-permit inspection on petitioner's property, the DEC cannot subsequently require petitioner's consent to a pre-permit inspection on his property as a condition precedent to a completed permit

application. Nor can it deny petitioner a wetlands' permit based upon his refusal to give the DEC consent to enter upon his property in order to conduct a pre-permit inspection. Nor could the *nisi prius* court require petitioner to attend an adjudicatory hearing for the sole purpose of determining whether or not the DEC's demand for a pre-permit inspection on petitioner's property was "reasonably necessary" for it to make the required findings or determinations with regard to petitioner's permit application.

As well, the *nisi prius* court's rulings were erroneous as a matter of law because no governmental agency may condition the grant of a permit application upon a non-consensual pre-permit inspection on private property irrespective of whether or not it was reasonably necessary in order to evaluate an application for a permit; a pre-permit inspection on petitioner's property by a DEC staff member is not one of the requirements for a complete permit application; petitioner had no objection to a pre-permit inspection on his property by a private environmental consultant, which is expressly authorized by 6 NYCRR 621.4(K)(iii); that the DEC by conditioning the issuance of a permit upon its receipt of petitioner's consent to a pre-permit inspection on his property violated petitioner's right against unreasonable search and seizure under the Fourth Amendment to the United States Constitution; that petitioner's property does not come within the DEC's wetland permit jurisdiction pursuant to ECL 15-0505(1) and 6 NYCRR 608.5; and that petitioner's permit application should have been deemed approved on the basis of the five day demand provisions of 6 NYCRR 621.9(b) and (c).

An ordinance that requires an owner of residential property to submit to an inspection of his property violates

the owner's right to be free from searches as guaranteed by the Fourth Amendment to the United States Constitution (See *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 540, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967); *Sokolov v. Village of Freeport*, 52 N.Y.2d 341 (1981) (an intrusion upon a citizen's property as a condition precedent to the issuance of a permit is impermissible); *Town of Brookhaven v. Ronkonkoma Realty Corp.*, 164 A.D.2d 665 (2d Dept. 1989) (The Town of Brookhaven may not compel a property owner to submit to a physical inspection of his premises, nor may it penalize the owner for failing to comply with the permit requirements of the Zoning Code).

The lower courts applied the "special needs" doctrine to this case. Previously, this doctrine had only been applied to "extraordinary situations" (*United States v. Paulino*, 850 F.2d 93, 97 (2d Cir. 1988)); commercial enterprises, public facilities governed by regulatory schemes and to the living spaces of paroles. "Neither the Supreme Court nor this Court has ever permitted warrantless administrative searches of a person's residence unless: exigent circumstances exist[ed], business was conducted in the home, or the search was directed at convicted felons still serving sentences of probation or parole" (*Anobile v. Pelligrino*, 303 F.3d 107, 120 (2d Cir. 2002) (emphasis supplied); *Michigan v. Clifford*, 464 U.S. 287, 291-92, 104 S.Ct. 641, 78 L.Ed.2d 477 (1984)).

The "special needs" exception has never before been applied to inspections of private property and its owners who have absolutely no criminal involvement.

Warrantless searches are permissible only when there exists an immediate and weighty public need to sacrifice the

Fourth Amendment protections afforded our citizens (*Michigan v. Clifford, supra.* at 464 U.S. 293 (fire fighters may enter a burning building to "fight the blaze")).

The threshold issue to be determined in any given case is whether or not a "special need" actually exists. If there exists no "special need" beyond the normal need for law enforcement, application of the "special need" exception cannot be justified (*Nicholas v. Goord*, No. 01 Civ. 7891, 2003 U.S. Dist. LEXIS 1621, at *50 (S.D.N.Y. February 6, 2003); *New Jersey v. T.L.O.*, 469 U.S. 325, 342, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985) because "the delay inherent in obtaining a warrant would make it more difficult for probation officials to respond quickly to evidence of misconduct (citation omitted) and would reduce the deterrent effect that the possibility of expeditious searches would otherwise create (citation omitted)" (*Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S.Ct. 3164, 9 L.Ed.2d 709 (1987)). Therefore, under *Griffin*, absent some urgency to perform a search without a warrant and a concomitant need to deter criminal activity, there can exist no "special need" beyond the normal need for law enforcement, particularly where, as here, the DEC conditioned the issuance of a wetlands' permit upon petitioner's consent to an otherwise illegal inspection of his private residential property.

Every case in which this Court applied the "special needs" exception involved (1) some urgency to perform the search without a warrant and (2) the need to deter some criminal or other pernicious activity (*New Jersey T.L.O., supra.*); *Vernonia School District 47J v. Acton*, 515 U.S. 646, 654-661, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995); *Board of Education v. Earls*, 536 U.S. 822, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002) (a case relied upon by the *nisi prius*

court that involved drug testing); *Griffin v. Wisconsin, supra.*; *United States v. Knights*, 534 U.S. 112, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001); *United States v. Newton*, 181 F.Supp.2d 157 (E.D.N.Y. 2002); *Skinner v. Railway Labor Executive's Assn.*, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989); *National Treasury Employees Union v. Von Raab,* 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989); *Leventhal v. Knapek*, 266 F.3d 64 (2d Cir. 2001)).

The "special needs" exception should not be routinely invoked whenever a warrantless inspection is required pursuant to a "regulatory scheme"; it should not be invoked in the absence of a need beyond the normal need for law enforcement; it should not be invoked unless the warrant and probable-cause requirement is impracticable; it should not be invoked absent any need to deter criminal activity; it should not be invoked absent some urgency to perform the search without a warrant; and it should not be invoked against an ordinary citizen by making entry upon his property a condition to the issuance of a tidal wetlands' permit, which in this case the DEC has sought to do.

The *nisi prius* court ruled that the DEC had a "reasonable need" that outweighed the plaintiff's expectation of privacy. However, application of the "special needs" exception requires a threshold analysis whether there exists any "special need", and it cannot be assumed that every governmental regulation gives birth to a "special need" as a condition precedent to the issuance of a permit. Even if the DEC did have a legitimate "special need" beyond the normal need for law enforcement to make the warrant and probable-cause requirement impracticable, the inquiry does not end there since "[e]ven where a court concludes that a statute or program qualifies as a 'special need, beyond the normal need

for law enforcement,' the reasonableness of the intrusion must still be evaluated through a balancing analysis" (*Nicholas v. Goord, supra.*).

The U.S. Supreme Court has articulated three factors to be considered in determinating whether governmental intrusion upon the individual's expectation of privacy is justified by the "special needs" of the government: (1) the nature of the privacy interest upon which the search intrudes, (2) the character of the intrusion that is complained of and (3) the nature and immediacy of the governmental concern at issue, and the efficacy of the means for meeting it (*Vernonia Sch. Dist. 47J v. Acton, supra.; Bd. of Educ. v. Earls, supra.*).

None of these factors supports an extension of the "special needs" exception to the DEC's requirement that it be permitted to invade petitioner's property as a condition precedent to its issuance to petitioner of a wetlands' permit. The right to exclude government agents from the home and the curtilage surrounding the home is the bed rock of Fourth Amendment jurisprudence. That protection is being violated by the DEC when it required petitioner to consent to a pre-permit inspection on his property as a condition to the issuance to petitioner of a wetlands' permit. The purpose served by this entry - inspection requirement of the permit granting process - was neither weighty nor immediate.

Application of the balancing test to this case weighs heavily against applying a novel and far reaching extension of the "special needs" exception in order to negate petitioner's Fourth Amendment rights.

It is palpable that the nature of the DEC's governmental interest does not warrant application of the

"special needs" exception and the opinion of the *nisi prius* court in this case does not recite a single legitimate governmental interest that would have been compromised had it refused to refer the issue to administrative review, let alone to have placed the burden of proof upon the petitioner to demonstrate that a pre-permit inspection on his property was not reasonably necessary. Although the lower courts perceived an interest to perform a regulatory inspection in order to protect the natural resources and the public beaches and waterways, no pellucid reason is given why such interest is, in any way, compromised unless petitioner's Fourth Amendment protections are compromised. No cogent reason has been advanced why the warrant and probable-cause requirement is impracticable. No reason has been suggested why violating petitioner's Fourth Amendment rights, in any way, protects the natural resources and the public beaches and waterways.

Inherent in the lower courts' opinions is the fact that the DEC lacked any immediate need to inspect petitioner's property. If there existed no immediate need to inspect petitioner's property, it would logically follow that no governmental interest would be at stake requiring the lower courts to abide the DEC's violation of petitioner's Fourth Amendment protections; and, there existed no reason for the DEC to forego the warrant requirement of the Fourth Amendment (*Board of Education v. Earls, supra.* at 536 U.S. 836); *Vernonia School District 47J v. Acton, supra.* at 515 U.S. 662-663); *Griffin v. Wisconsin, supra.* at 483 U.S. 876; *O'Connor v. Ortega*, 480 U.S. 709, 724, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987)).

In this case, there is no evidence in the record that petitioner had begun construction or was otherwise engaged

in conduct that could potentially damage the wetlands. All of the parties agreed, including petitioner, that construction could not commence absent a permit; and, it is undisputed that the DEC had adamantly refused to grant petitioner a permit unless he gave his consent to a pre-permit inspection on his property, which petitioner, just as adamantly, refused to give the DEC.

Without doubt, petitioner's home and curtilage are entitled to the most stringent Fourth Amendment protection. The lower courts' attempt to minimize any intrusion upon petitioner's property ignores facts that are critical to an appropriate analysis of petitioner's Fourth Amendment protections. The entry by DEC personnel upon petitioner's property as a condition precedent to the issuance of a wetlands' permit raises serious Fourth Amendment concerns that cannot be characterized as de minimus (*Camara v. Municipal Court of San Francisco, supra.* at 387 U.S. 530-31 ("even the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority")).

The lower courts opined that petitioner had a diminished expectation of privacy in the curtilage around his home. It is an elemental proposition, which petitioner does not dispute, that private areas of a home or curtilage visible to members of the public are not protected from inspection by governmental agents so long as they do not enter upon the property and view such private areas from a permissible vantage point such as a public road or waterway (*United States v. Knotts*, 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983); *California v. Ciraolo*, 476 U.S. 207, 213, 106 St. Ct. 1809, 90 L.Ed.2d 210 (1986); *Dow Chemical Co. v.*

United States, 476 U.S. 227, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986)).

However, quite plainly, even if a person's living room can be seen from the street by passers-by through a glass window, that fact does not permit entry of the home by governmental agents because physical entry upon the property is much more intrusive than a mere visual inspection from the periphery (*Dow Chemical Co. v. United States, supra.* at 237 (finding that aerial inspection of area in question was permissible but stating that "[a]ny actual physical entry by [the] EPA into any enclosed area would raise significantly different questions"); *United States v. Hatfield*, 333 F.3d 1189, 1198 (10th Cir. 2003) (explaining that if the officer had "physically invaded the curtilage to make his observation, that would have constituted a search subject to the proscriptions of the Fourth Amendment"); *United States v. Jenkins*, 124 F.3d 768, 774 (6th Cir. 1997) ("Visual inspection from a lawful vantage point, however, is quite different from the physical assault on defendants' backyard that occurred in this case"); *United States v. Reilly*, 76 F.3d 1271, 1279 (2d Cir. 1996) (noting the fact that information was gathered "only after the officers invaded the area" put that case in "stark contradistinction to the situation in *Dunn*, where the officers stood outside the protected curtilage"); *Florida v. Riley*, 488 U.S. 445, 449 (1989) ("[T]he home and its curtilage are not necessarily protected from inspection that involves no physical invasion . . . As a general proposition, the police may see what may be seen 'from a public vantage point where [they have] a right to be'"); *California v. Ciraolo, supra.* at 476 U.S. 213 ("The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor

does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be . . ."))

In this case, the DEC refused to inspect the bottom of the Great South Bay adjacent to, and beneath, a dock extending approximately 92 feet into the bay and insisted that it be permitted to enter upon petitioner's property to conduct the inspection. The lower courts' overly dismissive view of the physical intrusion that would have occurred in this case trivializes the importance of the Fourth Amendment protections at stake. The fact that the inspection at issue in this case would involve a mere intrusion upon petitioner's privacy does nothing to excuse the constitutional violation, as the lower court propounds, but rather exacerbates it (*Camara v. Municipal Court of San Francisco, supra.* at 387 U.S. at 531 ("the possibility of criminal entry under the guise of official sanction is a serious threat to personal and family security").

There exists no case that suggests that a trespass, *de minimus* or otherwise, into an individual's backyard does not constitute a Fourth Amendment violation since "any unauthorized physical penetration [is] a search" (*Reed v. Schneider*, 612 F.Supp. 216, 220 (E.D.N.Y. 1985)).

CONCLUSION

The petition should be granted.

Respectfully submitted,
R. Bertil Peterson
Counsel of Record
Attorney for Petitioner and
Staff Counsel for
The Coalition of Landlords,
Homeowners & Merchants, Inc.
Attorney for Petitioner
28 East Main Street
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Appendix A - Decision of the Court of Appeals, State New York, Dated and Entered November 21, 2006 [1a - 2a]

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany of the twenty-first day of November, 2006

PRESENT, HON. JUDITH KAYE, *Chief Judge, presiding*

2-10 Mo. No. 1016

In the Matter of Paul Palmieri,
Appellant,

v.

New York State Department of Environmental Conservation et al.,
Respondents.

The appellant having filed notice of appeal and a motion for leave to appeal to the Court of Appeals in the above cause, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, on the Court's own motion, that the appeal be and the same hereby is dismissed, without costs, upon the ground that the order appealed from does not finally

determine the proceeding within the meaning of the Constitution; and it is

ORDERED, that the said motion for leave to appeal be and the same hereby is denied.

S/_____
Stuart M. Cohen
Clerk of the Court

Appendix B - Decision of the Appellate Division, Second Department, State of New York, Dated and Entered July 18, 2006 [3a - 5a]

APPELLATE DIVISION
SECOND DEPARTMENT

In the Matter of Paul Palmieri,
Appellant,

v.

New York State Department of
Environmental Conservation et al.,
Respondents.

Docket No. 2004 - 5943

Suffolk Co. Index No. 3925/02
2006 NY Slip Op 5793; 31 A.D.3d 645
820 N.Y.S.2d 77, 2006 N.Y. App. Div. *LEXIS* 9378

In a proceeding pursuant to CPLR article 78 to review a determination of the New York State Department of Environmental Conservation pursuant to Environmental Conservation Law articles 15 and 25 that, inter alia, the petitioner's application for a permit to extend his dock was incomplete, the petitioner appeals, as limited by his brief, from stated portions of a judgment of the Supreme Court, Suffolk county (Baisley, J.), dated July 25, 2003, which, inter alia, upon, in effect, determining that the petitioner's wetland permit was complete, directed an administrative hearing on the issue of whether an inspection of his property by the

Appendix B
[Decision of the Appellate Division, Second Department, State of New York, Dated and Entered July 18, 2006]

Department of Environmental Conservation was reasonably necessary.

Ordered that the judgment is affirmed insofar as appealed from, with costs.

The Supreme Court, in effect, determined that the petitioner's wetlands permit application was complete. However, the fact that an application is complete does not preclude the Department of Environmental Conservation (hereinafter the DEC) from requesting supplemental information, including an on-site inspection, during the postcompletion review of an application (*see* 6 NYCRR 621.1[c]; 621.7[f]; 621.15[b]; *Matter of Benlevi Obedian & Benlevi v. New York State Dept. of Envtl. Conservation*, 144 AD2d 358, 361 [1988]; *Matter of Atlantic Cement Co. v. Williams*, 129 AD2d 84, 90 [1987]). Under the circumstances of this case, the Supreme Court properly directed an [*2] administrative hearing on the issue of whether an inspection of the petitioner's property was reasonably necessary.

Contrary to the petitioner's contention, the Fourth Amendment to the United States Constitution does not bar a warrantless inspection of his premises (see *Palmieri v. Lynch*, 392 F3d 73 [2004], *cert denied* 546 US __, 126 S Ct 424 [2005]; *see also Vernonia School Dist. 47J Acton*, 515 US 646 [1995]; *Matter of Thompson v. Department of Envtl. Conservation of State of NY*, 132 AD2d 665 [1987]). A

request by the DEC for an on-site inspection of the wetlands and adjacent areas on his property, in order to review the accuracy and impact of the petitioner's permit application, fell within the special needs exception to the Fourth Amendment's warrant requirement (*see Palmieri v. Lynch, supra*). In this instance, the state's interest in protecting wetlands is strong. Moreover, the petitioner's expectation of privacy was diminished by the fact that his yard was open and exposed to the Great South Bay, that he applied for a permit to build in tidal wetlands, that he had previously consented to periodic inspections, and that the inspection would be a minimal intrusion (*id; see also Vernonia School Dist. 47J v. Acton, supra; Matter of Thompson v. Department of Envtl. Conservation of State of N.Y., supra*).

The petitioner's remaining contentions are without merit (*see Matter of Northern Metro. Residential Healthcare Facility, Inc. v. Novello*, 24 AD3d 1069, 1071 n 1 [2005]; *DiCarlo v. City of New York*, 286 AD2d 363, 365 [2001]; *Matter of Calm Lake Dev. v. Town Bd. of Town of Farmington*, 213 AD2d 979 [1995]). Florio, J.P., Crane, Ritter and Fisher, JJ., concur.

Appendix C - Judgment of Supreme Court, State of New York, County of Suffolk, Dated July 25, 2003 and Entered August 8, 2003 [6a - 9a]

At an IAS Term, Part 36 [of] the Supreme Court of the State of New York, held in and for the County of Suffolk, at the Supreme Court, Riverhead, New York on the 25th day of July, 2003

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

Paul Palmieri,

Petitioner,

Index No. 02-03925

v.

Baisley, J.

New York State Department of Environmental Conservation; ERIN M. CROTTY, Commissioner; and MOLLY T. McBRIDE, Administrative Law Judge,

JUDGMENT

Respondents.

Petitioner Paul Palmieri, by his attorney Law Offices of Timothy M. McEnaney, Esq., staff counsel to the Coalition of Landlords, Homeowners, and Merchants, Inc., having commenced a proceeding under CPLR Article 78 on

Appendix C
[Judgment of Supreme Court, State of New York, County of Suffolk, Dated July 25, and Entered August 8, 2003]

March 4, 2002, by the filing of a notice of petition and verified petition, and respondents having duly appeared by Eliot Spitzer, Attorney General, State of New York, by Gregory J. Nolan, Assistant Attorney General, and petitioner having then served and filed an amended verified petition dated April 2, 2002, challenging a Department of Environmental Conservation ("NYSDEC") Ruling of the Commissioner dated February 1, 2002, which ruling determined that petitioner's application for a permit to extend a dock and install additional boatlifts was incomplete because petitioner refused to allow agency staff to inspect the site of the proposed project; and respondents having served and filed a verified answer to the amended petition dated July 22, 2002, together with a copy of the administrative record of said Ruling and an affirmation in opposition to the petition of Assistant Attorney General Gregory J. Nolan dated July 22, 2002, with exhibits, and a memorandum of law in opposition to the petition; and petitioner having served and filed a reply affirmation dated August 26, 2002, with exhibits, made by Joseph F. Battista, Esq., of counsel to petitioner's counsel, together with an affidavit of petitioner sworn to on August 26, 2002, with exhibits, which reply asserted a new claim, to wit, that petitioner was entitled to a permit because of an alleged "five day demand letter" sent pursuant to ECL Section 70-0109.3(b) and 6 NYCRR Section 621.9(b); and respondents having served and filed (after obtaining leave of court with consent of petitioner's counsel) a sur-reply memorandum of law in opposition to the petition dated December 4, 2002 together with affidavits in support of the sur-reply, with exhibits, sworn to by William R. Adriance on

Appendix C
[Judgment of Supreme Court, State of New York, County of Suffolk, Dated July 25, and Entered August 8, 2003]

December 3, 2002, Michael A. Mascelli on December 4, 2002, Emily Limbach on December 4, 2002, and an affirmation with exhibits in support or the sur-reply made by Gregory J. Nolan, Esq. on December 4, 2002; and petitioner having served and filed a "Second reply Affirmation" dated January 15, 2003 made by Joseph F. Battista, Esq., of counsel to petitioner's counsel, together with an affidavit of petitioner sworn to on January 15, 2003, with exhibits; and petitioner having submitted additional exhibits to the court under cover of correspondence dated February 20, 2003; and the court, after due deliberation, on the 5th day of May, 2003, having made and filed a Memorandum decision [sic.] (a copy of which is annexed hereto and made a part hereof) determining that the DEC had jurisdiction to either grant or deny a tidal wetlands permit for petitioner's proposed project, that NYSDEC's attempt to enforce a non-consensual site inspection of petitioner's property did not violate petitioner's constitutional rights; that petitioner's claim for a permit based on the five day demand provisions of 6 NYCRR Section 621.9(b)(c) had not been raised at the administrative level and so was not considered by the court; and that when petitioner's permit application was denied on the ground that without a site inspection NYSDEC cold not determine whether or not the petitioner's proposal complied with the standards for permit issuance, petitioner was entitled to an adjudicatory hearing pursuant to 6 NYCRR Section 621.7(f),

NOW, on motion of Eliot Spitzer, Attorney General of the State of New York and attorney for respondents, it is

Appendix C
[Judgment of Supreme Court, State of New York, County of Suffolk, Dated July 25, and Entered August 8, 2003]

ADJUDGED, DECREED, AND DECLARED, that the petition is granted to the extent that petitioner is held to be entitled to an adjudicatory hearing pursuant to 6 NYCRR Section 621.7(f); and its is further

ORDERED, ADJUDGED AND DECREED, that the petition is otherwise denied, and it is further

ORDERED, ADJUDGED AND DECREED, that the petition [sic.] shall have the burden at such hearing of demonstrating that NYSDEC's demand for an on-site inspection of the petitioner's property is not reasonably necessary in order to evaluate the petitioner's application for a wetlands permit (6 NYCRR Section 624.9(b)(1).

ENTER

GRANTED

JUL 25, 2003

S/ Paul J. Baisley, Jr.
J.S.C.

Edward P. Romaine
Clerk of Suffolk County

Appendix D - Memorandum Decision of Supreme Court, State of New York, County of Suffolk, Dated and Filed May 5, 2003 [10a - 21a]

MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY I.A.S. PART 36

Paul Palmieri,	By: Baisley, J.S.C.
Petitioner,	Dated: May 5, 2003
v.	Index No. 02-3925
New York State Department of Environmental Conservation; ERIN M. CROTTY, Commissioner; and MOLLY T. McBRIDE, Administrative Law Judge,	Mot. Seq. #001-SDISPSJ Return Date: 4-3-02 Adjourned: 1-16-03
Respondents.	

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Appendix D

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This Article 78 proceeding arises out of respondent's denial of petitioner's application for a tidal wetland permit. The petitioner owns property located in Babylon, New York which adjoins the Great South Bay. The property is improved by the petitioner's house and backyard fencing. The rear of the property, which is adjacent to the water, is improved with a bulkhead, a 92 foot long dock extending outward from the bulkhead and three boat lifts.

In 1991 the petitioner applied for and was granted tidal wetlands permits for the reconstruction of a bulkhead and construction of a 30 foot by 10 foot ramp, a 5 foot by 45 foot float and pilings and a 52 foot fixed pier with additional pilings and two boat lifts. Following construction of these improvements and in January of 1993, the petitioner applied for another tidal wetlands permit to extend the existing 52 foot dock an additional 110 feet and to add two more boat lifts. This application was denied by the respondent, the New York State Department of Environmental Conservation (NYSDEC), on November 4, 1993. Following the petitioner's request for an administrative hearing, a settlement was reached wherein it was greed that a permit would be issued for a dock extension of 40 feet and for construction of an additional boat lift (Administrative Record, pages 22-23).

The petitioner submitted the current application for a tidal wetlands permit in May of 1999. He sought to extend the existing 92 foot dock by 50 feet and to add another boat lift. By a NOTICE OF INCOMPLETE APPLICATION

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(Incomplete Notice) dated July 13, 1999, NYSDEC informed the petitioner that his application was incomplete in that he was required to submit photographs, project plans, a location map, a recent survey, proof that the proposed dock extension and boat lift were reasonable and necessary and information as to how many boats would be moored (Administrative Record, page 56). The petitioner was served with a second "Notice of Incomplete Application" (Second Incomplete Notice) which indicated that his application was still designated as incomplete as he had failed to submit a recent survey of the project site (Administrative Record, page 64). By letter dated April 7, 2000, NYSDEC informed the petitioner that his application was complete except for an on-site inspection. Following petitioner's continued refusal to allow NYSDEC to conduct an on-site inspection, NYSDEC denied the permit application by "Notice of Permit Denial" (Notice of Denial), dated July 7, 2000. NYSDEC denied the application on the ground that the petitioner failed to allow NYSDEC to conduct an on-site inspection of the property. The Notice of Denial further informed the petitioner that he had a right to a public hearing pursuant to NYCRR 621.7(f). Subsequently, the petitioner requested a hearing on the denial of the permit.[1] The hearing, which was initially scheduled for March 21, 2001, was adjourned to June 25, 2001 because of NYSDEC staff unavailability. Neither the petitioner nor his attorney appeared at the adjourned hearing.

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1. In NYSDEC's request for a hearing, it indicated that a Notice of Complete Application was not required since the proposed activity was classified as a minor project.

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NYSDEC then moved for administrative judicial intervention. On the motion NYSDEC contended that the petitioner's failure to appear at the re-scheduled hearing should be considered as an abandonment or withdrawal of the request for a hearing or a default. NYSDEC contended alternatively, that NYSDEC's denial of the permit application should be affirmed without the need for an adjudicatory hearing on the ground that controlling administrative case law precludes a hearing until petitioner consents to an on site inspection. Petitioner opposed the motion on the grounds that NYSDEC failed to confirm the adjourned hearing date and to provide proof of publication of the notice of hearing.[2]

An undated decision was rendered on the petitioner's motion by Administrative Law Judge Molly McBride (ALJ, the "McBride Ruling"). Initially, the ALJ determined that there was no confirmation that petitioner's attorney saw the notice of the adjourned hearing. The ALJ further determined "Frankly, scheduling errors occur and such a sever penalty as requested by Staff [NYSDEC] is not warranted here" (Administrative Record, page 7). With regard to NYSDEC's

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2. Petitioner's attorney, in a letter dated April 27, 2000, contended that NYSDEC could conduct a review of the permit application in a manner less intrusive than an on-site inspection, particularly where there is an alternative method of inspection such as from a waterway. Petitioner's attorney further contended that a non-consensual on-site inspection was tantamount to an illegal warrantless search.

alternate request for relief, the ALJ determined that NYSDEC could not determine whether the application met the standards for permit issuance without conducting an on-site inspection. The ALJ decided that if it cannot be determined whether the standards have been met, then the application cannot be deemed complete. The ALJ recommended that the Notice of Denial be vacated and replaced with a Notice of Incomplete Application. The ALJ further recommended that the petitioner's request for a hearing be treated as void since such a request could not be made in response to a Notice of Incomplete Application. The ALJ concluded that there could be no further processing of the petitioner's application until it was complete.

In a Ruling dated February 1, 2002, the respondent Erin M. Crotty as the Commissioner of NYSDEC, adopted the decision of the ALJ (the Commissioner's Ruling). The Commissioner commented in the Ruling:

> "I find that the Applicant's tidal wetlands application under review must be deemed incomplete for the purposes of permit processing under the Department's Uniform Procedures, 6 NYCRR part 621. The Applicant's denial of access to his property prevented Department Staff from evaluating the on-site conditions and the proposed project. The ability to gather such information is necessary to make the determination that the permit application is complete. The Applicant's actions effectively relieves Department Staff from taking any further action on

> the permit application until access to the site and site information is available for Staffs review. Further, I am determining that the Applicant's request for hearing on its proposed project is void until such time as the site access and the necessary information is made part of the permit application. Thereafter, if and when said information is supplied and Staffs redetermination is to deny the proposed project, then the Applicant will be afforded a hearing on Staffs denial of the requested permit" (Administrative Record, pages 2 to 3).

Petitioner then commenced this special proceeding by service of a notice of petition and verified petition. Petitioner subsequently served an amended verified petition. Petitioner seeks in the amended petition a judgment annulling and vacating the Commissioner's ruling to the extent it affirms those portions of the McBride ruling determining that the petitioner's application was incomplete and that the petitioner's request for a hearing was void. Petitioner also seeks a review of the McBride Ruling. Petitioner contends that: (i) pursuant to 6 NYCRR 621.4(k), an on-site inspection by a NYSDEC staff member is not one of the requirements for a complete permit,[3] (ii) the McBride decision violates the provisions of ECL 70-0109(1)(a)(b) and 6 NYCRR 621.5(b) which deem an application complete

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3. Petitioner avers that he has no objection to an on-site inspection by a private environmental consultant pursuant to 6 NYCRR 621.4(k)(iii).

unless NYSDEC mails a Written [sic.] notice that the application is incomplete within 15 calendar days, (iii) the ALJ in the McBride Ruling improperly relied on an Interim Decision of the Deputy Commissioner of NYSDEC, dated November 6, 2000 (the *Bath Storage* decision) in holding that an adjudicatory hearing is not available for review of a permit denial based on the incompleteness of the application, and (iv) NYSDEC's attempt to enforce a non-consensual, warrantless site inspection violates petitioner's right against unreasonable search and seizure under the Fourth Amendment of the United States Constitution. Petitioner further contends that his property does not come wthin NYSDEC's wetland permit jurisdiction pursuant to ECL [15-]0505(1) and 6 NYCRR 608.5.[4]

Petitioner's claim that NYSDEC lacked jurisdiction to either grant or deny a tidal wetlands permit for the petitioner's project is considered first. Article 25 of the

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4. Petitioner's attorney also contended in the reply affirmation that the permit application should be deemed approved on the basis of the five day demand provisions of 6 NYCRR 621.9(b)(c). The Court did not consider this contention since the issue was not raised at the administrative level (*Ambry v. Bd. of Trs. of N.Y. City Fire Dep't*, 298 A.D.2d 582, 748 N.Y.S.2d 681 [2002]). The cases cited by the petitioner to the contrary are inapposite since this issue does not relate to whether the Court has subject matter jurisdiction over this Article 78 proceeding (Cf, *Fry v. Village of Tarrytown*, 89 NY2d 714, 658 N.Y.S.2d 205 (19971) (sic.).

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Environmental Conservation Law (Tidal Wetlands Act) was enacted as an expression of the State's public policy "to preserve and protect tidal wetlands. . . " (ECL 25-0102). Although the provisions of ECL 0505(1) and 6 NYCRR 608.5 acknowledge the Towns' control over the wetlands in the Counties of Nassau and Suffolk, these provisions should not be interpreted to preclude joint control over the issuance of wetland permits by the respective governmental entities (*see, Huntington v. Albicocco*, 66 AD2d 886, 411 NYS2d 675 [1978]). The provisions of Article 25 specifically state that the tidal wetland permits issued by NYSDEC shall be in addition to, and not in lieu of, any such permits required by the affected local municipality (ECL 25-0401(1); Weinberg, Practice Commentaries, McKinney's Cons Laws of NY, Book 17 1/2, ECL Section 25-0401, p. 433; *see*, 6 NYCRR 661.3).

Petitioner's contention that NYSDEC's attempt to enforce a non-consensual site inspection of his property violates his constitutional rights is also without merit. Where NYSDEC can demonstrate a reasonable need for the scientific information obtained by an on-site inspection, such inspections may be valid criteria for a wetlands permit (*Thompson v. Department of Environmental Conservation*, 132 AD2d 665, 518 NYS2d 36 [19871 [sic.] app. den. 71 NY2d 803, 527 NYS2d 769; *see*, 6 NYCRR 621.15(b)). The cases cited by the petitioner (*see Stender v. Albany,* 188 AD2d 986, 592 NYS2d 70, 547 NYS2d 68 [1992], app. dis. 81 NY2d 1006, 599 NYS2d 805; *Brookhaven v. Ronkoma* [sic.] *Realty Corp.*, 154 AD2d 665, [19891) [sic.] are

inapposite in that an on-site inspection is a minimal intrusion and petitioner's project poses a diminished expectation of privacy and as well is a matter of significant governmental interest (ECL 25-0102; 6 NYCRR 661.1, 661.9(b)(1); see *Bd of Educ. v. Earls*, 536 US 822, 829, 122 S Ct 2559, 153 L Ed 2d 735 [2002]).

Petitioner's other contentions in effect challenge that part of the Commissioner's Ruling that NYSDEC is relieved from any further action including a hearing on the petitioner's application until he complies with its demand for an on-site inspection. In reaching this determination the Commissioner adopted the McBride Ruling as his own. Accordingly, in order to determine the efficacy of the Commissioner's Ruling, the court must review the findings in the McBride Ruling.

The record establishes that initially NYSDEC afforded the petitioner the right to a public adjudicatory hearing in the Notice of Denial. This hearing was adjourned because of NYSDEC's inability to proceed. Although neither the petitioner nor his attorney appeared at the adjourned date of the hearing, the ALJ subsequently determined that petitioner should not be deprived of his right to a hearing on this ground. The ALJ, by characterizing the petitioner's application as incomplete, determined that no further action, including the adjudicatory hearing, could be taken. The Court finds that this was error and petitioner should have been afforded the opportunity at an adjudicatory

hearing to demonstrate whether NYSDEC's request for an on-site inspection was reasonable and necessary.[5]

Following petitioner's submission of his tidal wetlands permit, he was served with the Incomplete Notices which did not require an on-site inspection. The requirements for a complete application are listed in 6 NYCRR 661.12(a)(1), 6 NYCRR 621.3 and under the circumstances of this case, also in 6 NYCRR 621.4(k). Although these sections do not specifically provide for an on-site inspection as a prerequisite for a complete application, NYSDEC has the general authority to request supplemental information during the course of permit review to enable it [to] make the findings and determinations required by law (6 NYCRR 621.1(d)). NYSDEC may also request during the permit review process additional information "which is *reasonably necessary* to make any findings or determinations required by law" (6 NYCRR 621.15(b), emphasis added). NYSDEC may fix a date for receipt of the additional information and if the information is

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5. The ALJ found that NYSDEC could not determine if the petitioner's application met the standards for permit issuance without an on-site inspection. This finding was premature, not having been based on evidence adduced in an adjudicatory hearing.

not timely submitted it "may be grounds for *denial* of the application" (6 NYCRR 621.15(b), emphasis added).[6]

Here petitioner's application was denied on the ground that without a site inspection NYSDEC could not determine whether or not the petitioner's proposal complied with the standards for permit issuance. Petitioner, upon his request pursuant to 6 NYCRR 621.7(f), was entitled to an adjudicatory hearing on whether or not NYSDEC's demand for an on-site inspection was reasonably necessary to make the required findings or determinations with regard to the petitioner's permit application. The ALJ's reliance on the *Bath Storage* decision is misplaced. the Deputy Commissioner in *Bath Storage* noted:

> "There may be times when an application is determined to be complete by Staff but after further review, Staff requests additional information in accordance with 6 NYCRR 621.15(b). In some of these instances, adjudication might proceed on points of dispute where a *reasonable interpretation* indicates that supplemental information is necessary

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6. NYSDEC, in its memorandum of law in opposition to the petition, requests that "should the DEC's action not be found to be a non-reviewable determination that Palmieri's permit application is incomplete, it should be viewed as a denial of the application on the ground that Palmieri failed to meet his burden of establishing that his proposed project meets all applicable regulatory standards" (pages 17-18).

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> to complete staff's review. Such is not the case in this proceeding" (amended verified petition, Exhibit G, page 5, emphasis added).

In the case at bar NYSDEC had determined that petitioner's application was complete except for information to be derived from an on-site inspection which NYSDEC believed was reasonably necessary for its review of the petitioner's permit. Requiring an adjudicatory hearing on this issue would not, as the Deputy Commissioner opined in *Bath Storage*, turn "the permitting process on its head."

Accordingly, this petition is granted to the extent that petitioner is held to be entitled to an adjudicatory hearing pursuant to 6 NYCRR 621.7(f), and is otherwise denied. Petitioner shall have the burden at such hearing of demonstrating that NYSDEC's demand for an on-site inspection of the petitioner's property is not reasonably necessary in order to evaluate the petitioner's application for a wetlands permit (6 NYCRR 624.9(b)(1)).

Settle judgment on five days' notice.

PAUL J. BAISLEY, JR.
J.S.C.

Appendix E - Decision of the Commissioner, State of New York, Department of Environmental Conservation, Dated and Filed April 7, 2004 [22a - 33a]

STATE OF NEW YORK DEPARTMENT
OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1550

In the Matter

-of-

the application for a tidal wetlands permit, use and protection of water permit, and water quality certification pursuant to the Environmental Conservation Law (ECL) articles 15 and 25, and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) Parts 608 and 661

-by

PAUL PALMIERI

Applicant.

PERMIT APPLICATION No. 1-4720-00666/00009

DECISION OF THE COMMISSIONER

April 7, 2004

Appendix E
[Decision of the Commissioner, State of New York, Department of Environmental Conservation, Dated and Filed April 7, 2004]

DECISION OF THE COMMISSIONER

The attached hearing report, except for the section headed "Recommendation," of Administrative Law Judge ("ALJ") Molly T. McBride in the matter of the application of Paul Palmieri for a tidal wetlands permit, protection of waters permit, and water quality certification is hereby adopted as the decision in this matter subject to the following additional findings and conclusions.

This matter is before the Department of Environmental Conservation ("Department") pursuant to an order of Supreme Court, Suffolk County (see Matter of Palmieri v. New York State Dept. of Envtl. Conservation, Sup Ct, Suffolk County, May 5, 2003, Baisley, J., Index No. 02-3925). In that order, Supreme Court remanded the matter to the Department to afford applicant Paul Palmieri an adjudicatory hearing on the issue of whether Department staff's demand for an on-site inspection of applicant's property is reasonably necessary in order to evaluate applicant's application for a tidal wetlands permit (see id. at 6). The court placed the burden upon applicant to demonstrate that the Department's demand is not reasonably necessary in order to evaluate his application (see id.).

The hearing record demonstrates that applicant failed to meet his burden of proof that Department staff's request to inspect the project site from applicant's property is not reasonably necessary. Accordingly, for the reasons stated in

the hearing report and in this decision, I affirm Department staff's denial of the permit application.

Discussion

As an initial matter, it is important to note the narrow scope of the issue remanded for hearing by Supreme Court, Applicant devotes significant portions of his post-hearing brief to the ALJ to the argument that Department staff's demand for a pre-permit inspection on applicant's property to evaluate his wetlands permit application constitutes an unreasonable intrusion and unconstitutional search in violation of the Fourth Amendment of the United States Constitution, and an illegal trespass under New York law. In its order in the CPLR article 78 proceeding initiated by applicant, however, Supreme Court expressly rejected these arguments. The court held:

> "[Applicant's] contention that NYSDEC's attempt to enforce a non-consensual site inspection of his property violates his constitutional rights is also without merit. Where NYSDEC can demonstrate a reasonable need for the scientific information obtained by an on-site inspection, such inspections may be valid criteria for a wetlands permit . . . The cases cited by the petitioner . . . are inapposite in that an on-site inspection is a minimal intrusion and petitioner's project poses a diminished expectation of

privacy and as well is a matter of significant governmental interest"

(id. at 4-5 [citations omitted]; see also Palmieri v. Lynch, US Dist Ct, Ed NY, Aug. 29, 2003, Seybert, J., 00-CV-3225 [dismissing similar claims under federal law that the Department's on-site inspection violated applicant's 4th Amendment rights]).

The court also expressly recognized that the Department has the authority to request during the permit review process additional information that is "reasonably necessary" to make any findings or determinations required by law in connection with the permit application, and that an applicant's failure to provide such information may be grounds for denial of an application (see id. at 5 [citing 6 NYCRR 621.1(d) and 621.15(b)]). Thus, applicant's arguments under federal and state law were rejected by Supreme Court, and are not presently before the Department on this remand.

Accordingly, the narrow issue presented for hearing is whether Department staffs demand for an on-site inspection complied with the regulatory requirement of 6 NYCRR 621.15(b), that is whether the demand was "reasonably necessary" to make the required findings or determinations with regard to applicant's tidal wetlands permit application (see id. at 6). As noted above, Supreme Court expressly placed the burden of proof on applicant (see

id. [citing 6 NYCRR 624.9(b)(1)]). The regulations applicable to permit hearing procedures establish that the party bearing the burden of proof must sustain that burden by a preponderance of the evidence unless a higher standard has been established by statute or regulation (see 6 NYCRR 624.9[c]).

Review of the hearing record reveals that applicant failed to carry his burden of proof. A preponderance of the credible evidence presented at the hearing establishes that on-site inspections by Department staff are reasonably necessary to evaluate tidal wetland permit applications, and to determine whether statutory and regulatory standards for permit issuance can be met [see Environmental Conservation Law 25-0402 & 25-0403, and 6 NYCRR 661.9(b)].

On-site inspections are reasonably necessary to allow the Department to most efficiently and effectively carry out its statutory and regulatory obligations. The record demonstrates that, due to the high volume of permit applications filed with the Department's Region 1 office, the limited number of available inspectors must conduct numerous tidal wetland permit application inspections per day in an area covering both Nassau and Suffolk Counties.

Department staff's witness testified that on-site inspections are important in order to obtain the environmental information necessary for the evaluation of a tidal wetlands permit application with respect to the

applicable statutory and regulatory criteria. As testified, such on-site inspections provide significant information, including, for example, information on the upland topography, the extent and types of vegetated areas, the values of upland areas as buffers, existing structures, and drainage patterns.

Department staff's witness noted that on-site inspections afford a comprehensive view of the shoreline and upland areas. From the vantage point of the height of the bulkhead, it provides an opportunity to observe, among other things, water flow patterns and te condition of the areas seaward from the bulkhead.

Moreover, a preponderance of the credible evidence demonstrates that the Department had a reasonable need for the environmental information that wold have been obtained by an on-site inspection in this particular case. Review of applicant's permit application materials submitted in 1991, 1993, and 1999, respectively, suggest that the underwater area under applicant's dock may be subject to significant sedimentation and accretion. Thus, applicant's own application materials revealed that a significant degree of sedimentation or accretion was underway in the shoals, mud flats, and littoral zone just seaward of applicant's property that required evaluation before a permit could be issued.

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Staff's witness provided detailed reasons why access to the upland area of applicant's property was necessary, including to confirm that accretion was occurring and, if so, to evaluate its source. He testified that an upland inspection on applicant's property would include, for example, determining the sources and nature of run off from the property, inspecting the condition of the landward side of the bulkhead, and inspecting the shoreline adjacent to the property from a vantage point that allowed a comprehensive view.

Staff's witness also indicated that the best vantage point for assessing water quality and the condition of the shoals and mud flats seaward of the bulkhead was from the bulkhead itself, and that walking out on applicant's dock would provide a more effective means of observing underwater vegetation growth in the vicinity of the dock.

Applicant did not challenge staff's assertion that an assessment of the upland area of the project site was a necessary part of the permit application review. Rather, applicant's contention at hearing was that staff could access the project site either by boat or along the shoreline, and could conduct the inspection from either of those two routes without crossing or stepping foot on applicant's property.

The weight of the record evidence demonstrates that both alternatives suggested by applicant would provide a much less effective means for conducting the appropriate

inspection, both upland and in the water itself. In addition, the two alternatives are impracticable, more costly, time consuming, and wasteful of limited Departmental resources.[1] With respect to an inspection by boat, the record indicates that boats appropriate for use in the waters adjacent to applicant's project are not available to Department staff that review tidal wetlands permit application review.[2]

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1 Use of a boat, practically and as a matter of Department policy, requires at least two staff members in order to both operate the boat and conduct the inspection. The record clearly establishes that inspections conducted during routine, high-volume review of tidal wetland applications are usually conducted by one inspector from land.

2 Applicant introduced a list of boats (see Exh C) that are utilized by the Department, and argued that a Department-owned sixteen-foot Boston whaler was available to staff to use. Applicant did not establish by a preponderance of the evidence that the Boston whaler was available to staff to use.

More importantly, the record indicates that inspection of the upland area, the shoreline, and the relevant underwater areas would be less effective and significantly hindered if it had to be conducted from a boat rather than from applicant's property. Staff's witness testified that inspection by boat, due to safety considerations, would best be conducted during high tide, a condition less favorable to effective inspection of underwater shoals and mud flats, and where projects involving a dock are concerned.

Applicant referred to staff using a boat in 1995 to visit off-shore around his dock following the Department's denial of a prior permit application. This does not compel the conclusion that access to applicant's property is not reasonably necessary to evaluate applicant's 1999 permit application. To the contrary, the circumstances surrounding staff's use of a boat at that time demonstrates such use is atypical and out of the ordinary.[3]

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3 Applicant contends that staff also visited his site in 1991 by boat. This contention was not corroborated and, thus, the contention was not established by the preponderance of the evidence. Moreover, the record is entirely silent concerning the circumstances surrounding the 1991 visit, assuming it occurred by boat.

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As the record demonstrates, significant obstacles and costs are associated with applicant's second offered alternative of an inspection from the shoreline. applicant failed to establish that access to the shoreline from a public location was generally known. Moreover, applicant failed to establish that use of the shoreline would be a safe mens of gaining access to the project site. At most, applicant's witness established that the shoreline was rocky and sandy, but did not otherwise establish its condition. In contract, Department staff's witness noted potential hazards associated with walking along similar shorelines, including the difficulty of walking over algae-covered rocks and the presence of sinkhole-like features under the water.

Applicant also failed to indicate the height of the bulkhead or otherwise establish the bulkhead would not effectively block the view of the upland area and the area landward of the bulkhead to a viewer standing on the shoreline (or a viewer from a boat). To the contrary, staff's witness testified that bulkheads in the area are generally about six feet high.

Photographs entered into evidence by the applicant are the only record evidence of the actual height of the bulkhead in this case (see Exhs F, G, and H). Those photographs suggest that the bulkhead is taller than an adult male, and support the reasonable inference that the view of the upland area would be significantly blocked to an inspector of average height standing on the shoreline. In any

event, applicant fails to establish, by a preponderance of the evidence, that such an inspector could effectively conduct the necessary inspection of the upland area from the shoreline or from a boat.

Conclusion

The hearing record demonstrates that applicant failed to carry his burden of establishing, by a preponderance of the evidence, that staff's demand to conduct an on-site inspection was not reasonably necessary to make the required permit application. The weight of the record evidence supports the conclusion that such access was reasonably necessary, and that applicant's two proposed alternatives to on-site inspection would impose an unreasonable burden upon the limited resources of the Department and significantly hinder the necessary environmental assessments required to determine whether applicant's application meets with statutory and regulatory criteria.

Applicant has applied to the Department for the privilege of constructing a long extension to a dock in a State-protected tidal wetland. Because staff's request during the permit application review process for an on-site inspection was reasonably necessary to make the findings and determinations required by law, applicant's refusal to allow the on-site inspection is ground for denial of the 1999 permit application. Therefore, Department staff's

determination to deny the 1999 permit application is affirmed.

For the New York State
Department of Environmental
Conservation

S/_____
By: Erin M. Crotty, Commissioner

Dated: April 7, 2004
Albany, New York

Appendix F - Hearing Report of Administrative Law Judge Molly T. McBride Dated and Filed January 30, 2004 [34a- 46a]

STATE OF NEW YORK DEPARTMENT
OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1550

In the Matter

-of-

the application for a tidal wetlands permit, use and protection of water permit, and water quality certificate pursuant to the Environmental Conservation Law (ECL) Articles 15 and 25, and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) Parts 608 and 661 by

PAUL PALMIERI

PERMIT APPLICATION No. 1-4720-00666/00009

HEARING REPORT

-by-

Molly T. McBride
Administrative Law Judge
January 30, 2004

Appendix F
[Hearing Report of Administrative Law Judge Molly T. McBride Dated and Filed January 30, 2004]

PROCEEDINGS

In May 1999, an application for permits from the New York State Department of Environmental Conservation (Department) was made by Paul Palmieri (applicant), 123 East Shore Road, Babylon, New York, for a tidal wetlands permit, protection of waters permit and water quality certificate pursuant to ECL Article 25 and 6 NYCRR 661. The application was denied on July 7, 2000 and applicant requested an adjudicatory hearing. A hearing was scheduled for March 27, 2001 but was adjourned due to the unavailability of Staff's witness. The hearing was rescheduled for June 25, 2001. Applicant failed to appear for the hearing. Department Staff served a notice of motion for administrative judicial intervention on or about June 28, 2001 asking that the permit application be denied due to applicant's failure to appear at the hearing. Applicant opposed the motion. Department Staff had also moved for an order affirming its denial of the application due to applicant's refusal to allow Staff to conduct a site visit as part of the permit review process.

The motion was denied with regard to applicant's failure to appear for the hearing. By order of Commissioner Erin M. Crotty dated February 1, 2002, the application was deemed incomplete due to Department Staff's inability to enter the property for a site inspection and the hearing request was deemed void. Applicant commenced a proceeding in New York State Supreme Court pursuant to Article 78 of New York Civil Practice Law and Rules

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(CPLR) challenging the Commissioner's order. Supreme Court, Suffolk County, by order of Justice Paul Paisley, Jr. dated May 5, 2003, remanded the matter to the Department for a hearing on the sole issue of whether an on-site inspection by Department Staff, as part of the permit application review, was reasonably necessary.

BACKGROUND

This applicant has a history of filing permit applications with the Department for projects at this site. In 1991 applicant applied for a permit to reconstruct a bulkhead and to construct a 30' x 10' ramp and a 5' x 45' float and pilings. The permit was issued. Approximately 5 months later, applicant applied for a permit to construct a 52' fixed pier with additional pilings. This application was also granted. In 1993, one year after the second permit was issued, applicant sought to expand the existing 52' pier an additional 110', to add 2 boat lifts with 80,000 lb. and 16,000 lb. capabilities and to add 4 mooring pilings clusters. Staff denied this application. A hearing was requested by applicant after the denial. The parties entered into settlement discussions. During these discussions, a site visit was done by Department Staff via boat. Ultimately, the parties resolved the matter and a Stipulation of Settlement was entered into on May 30, 1995 wherein applicant agreed to modify the application and reduce the extension of the boat dock from 110' to 40' and to reduce the boat lift request from two boat lifts to one boat lift. Based upon the changes made to the application as a result of the settlement, Staff withdrew

its objections to the issuance of the permit and a permit was issued in June 1995.

In May 1999 applicant applied for a permit to construct an additional 50' extension of the dock and to add an 80,000 lb. boat lift. This is basically what was requested by applicant in his 1993 application, when combined with what was permitted in June 1995.

The May 1999 application was denied by Staff by letter dated July 7, 2000. The Notice of Permit Denial states, in part: "You failed to allow Department Staff to inspect the property to observe the conditions at the site in order to determine whether or not your proposal complies with the standards for permit issuance. Therefore, this application for permit is hereby denied." It is undisputed that applicant has refused Staff access to his property to inspect it as part of the permitting process. Applicant contends that Staff can conduct whatever inspection is necessary without entering his property.

Pursuant to the Order of the Supreme Court, a hearing was conducted on October 8, 2003 at the Babylon Public Library, 211 route 109, West Babylon, New York before Administrative Law Judge Molly T. McBride. The proceedings began with a legislative hearing at approximately 10:40 a.m. Applicant appeared with his counsel, Franklin Wilks, Esq. from the Coalition of Landlords, Homeowners and Merchants. The Department appeared by Craig L. Elgut, assistant regional attorney. No

persons came forward to speak on the project. At the conclusion of the legislative hearing, an issues conference was convened. No other persons, agencies or organizations participated in the hearing process as parties or sought party status. At the conclusion of the issues conference, the adjudicatory hearing was immediately commenced on the sole issue of whether the Department's demand to conduct an inspection of the project site from applicant's property as part of the permit application review was reasonably necessary. The Supreme Court placed the burden of proof for this issue on applicant.

The following witnesses testified on behalf of applicant: Paul Palmieri and Aram Terchunian, First Coastal Corp., applicant's environmental consultant. Charles T. Hamilton, regional supervisor of the Department's Office of Natural Resources, Region One, Stony Brook, New York testified on behalf of the Department.

The parties submitted post-hearing briefs and the hearing record closed on December 31, 2003 upon receipt of the briefs.

POSITION OF THE PARTIES

Applicant

Applicant maintains that the Department can conduct its permit application review without accessing his property. He contends that the Department can conduct its site

inspection from the water, by boat, or by walking along the shoreline after entering it from a public access point.

Department

The Department contends that the application can not be reviewed to determine if the standards for a tidal wetlands permit have been met without Department personnel accessing applicant's property. Department Staff also argues that applicant's suggestion of using a boat is not practical because they can rely on having boats available to do site inspections.

FINDINGS OF FACT

1. In May 1999, Paul Palmieri, applicant, 123 East Shore Drive, Babylon, New York, applied for a tidal wetlands and protection of waters permit and water quality certificate to expand an existing 92' dock structure by 50 feet and add an 80,000 pound boat lift at his property noted above. The proposed project is located on the Great South Bay, in the Town of Babylon, County of Suffolk.

2. The existing dock structure was permitted by the Department in three phases. The first phase permitted was to reconstruct a bulkhead and to construct a 30' x 10' ramp and a 5' x 45' float and pilings. The permit was issued in 1991. Approximately 5 months later, applicant applied for a permit to construct a 52' fixed pier with additional pilings which was also granted. A third permit application, filed in 1993,

one year after the second permit was issued, sought to expand the existing 52' pier an additional 110', to add 2 boat lifts with 80,000 lb. and 16,000 lb. capabilities and to add 4 moorings pilings clusters. This application was denied. After a request for a hearing was filed by applicant, the matter was resolved by an agreement between the parties which provided for the extension of the boat dock by 40' rather than 110' and the addition of one boat lift rather than two.

3. Applicant refused Department Staff access to his property in 1995 during the review of his 1993 permit application.

4. Department Staff attempted to access applicant's property during its review of the current permit application and applicant has refused Department Staff access to his property.

5. Department Staff notified applicant by letter dated April 7, 2000 that it would need to access the property to conduct a site inspection and complete the permit application review.

6. By letter dated July 7, 2000 the Department denied the latest permit application because it could not gain access to applicant's property to complete the permit application review.

Appendix F
[Hearing Report of Administrative Law Judge Molly T. McBride Dated and Filed January 30, 2004]

7. Applicant filed a request for a hearing on the permit application denial. A hearing was scheduled but adjourned at the request of Staff as witnesses were unavailable. The hearing was rescheduled but applicant and his counsel filed to appear on the rescheduled date.

8. Department Staff moved for an order determining the hearing process abandoned based upon applicant's failure to appear for the hearing or, in the alternative, for an order affirming Staff's denial of the permit application based upon applicant's refusal to allow Department Staff on his property to conduct the site inspection.

9. Commissioner Erin M.Crotty, by order dated February 1, 2002, denied the motion to dismiss due to applicant's failure to appear. The order also deemed the application incomplete based upon the Staff's inability to access applicant's property and, therefore, the hearing request was voided.

10. Applicant commenced a proceeding in New York Supreme Court, Suffolk County, pursuant to CPLR Article 78 Challenging the Commissioner's order. Supreme Court, Suffolk County (Baisley, J.), by decision dated May 5, 2003 granted the petition to the extent of remanding the matter to the Department for a hearing to allow applicant an opportunity to demonstrate the Department's request for an on-site inspection was not reasonable and necessary to evaluate the application for a wetland permit, and otherwise denied the petition. The decision placed the burden of proof

on applicant for the hearing. The hearing was held on October 8, 2003.

11. Applicant testified at the October 8, 2003 hearing that he will not agree to Department Staff entering his property as part of the permit review process. Applicant countered Department Staff's request with his suggestion that Department Staff inspect the project site by boat from the Great South Bay or enter the shoreline from a public access point and walk to applicant's project site. Applicant has not provided a specific route, specific entry point, nor provided details to Staff as to what they would find on any route that they may take to applicant's property if they did in fact enter the shoreline from a public access point and walk to his property.

12. Applicant was advised by Department Staff in writing that a boat was not available to them to conduct a site inspection. Applicant did not allow Staff onto his property after being told that a boat was not available.

13. Department Staff routinely conducts permit application reviews from an applicant's property. Department Staff testified as to numerous reasons why they need access to applicant's property as part of this permit application review.

14. Department Staff testified as to why the alternatives posed by applicant (walking shoreline or boat inspection) are not adequate for the permit application

review in this case. Those methods would not allow Staff to obtain all necessary information to assess the application. By way of example, Staff testified that there has been an abnormal amount of accretion in the area around the boat dock (water depth changed from 5-6' to 2 ½ to less than 4' from 1991 to the date of this application) and Staff would need to evaluate the upland, as well as the dock location to assess possible causes/problems. Charles Hamilton identified approximately twelve items he would be inspecting from applicant's property with respect to the accretion problem alone. Also, from applicant's property Staff would have an elevated spot to view organisms and plants from the water that would not be readily visible from the shoreline or from a boat in the water. The inspector can view the shoals and mudflats below for other factors as well. Based upon those findings, a second site inspection may be warranted at which time Staff would come out with testing gear and take some samplings for testing.

15. The Department's Region One office, where this application is pending, receives approximately 4,000 tidal wetland permit applications each calendar year. Each permit application requires review by Department Staff and four Staff members are responsible for all tidal wetlands applications inspections. The alternative methods proposed by applicant would be too time consuming to employ on a regular basis in the Department's application reviews.

16. Charles Hamilton testified that he conducted 27 site inspections on the day before this hearing. He testified

that that number of site inspections is not unusual due to the volume of permit applications received in their office each year. His other inspectors typically conduct 10-15 inspections per day. If he and his Staff were required to use a boat or take a circuitous route to applicant's property to conduct site inspections, they would not be able to complete as many site inspections and application processing would be delayed.

17. Applicant permitted his environmental consultant and employees to conduct a site inspection from his property.

18. Supreme Court, Justice Baisley, held that "Where NYSDEC can demonstrate a reasonable need for the scientific information obtained by an on-site inspection, such inspections may be valid criteria for a wetlands permit." (Baisley Memorandum Decision, p. 4, citing Thompson v. Dept. of Environmental Conservation 132 AD 2d 665).

CONCLUSIONS OF LAW

1. Section 624.9(b)(1) of 6 NYCRR states: "The applicant has the burden of proof to demonstrate that its proposal will be in compliance with all applicable laws and regulations administered by the department." Further, the Memorandum Decision of Justice Baisley remanding this matter for a hearing placed the burden of proof on applicant to show why the Department's demand for an on-site inspection of applicant's property is not reasonably necessary in order to evaluate the application.

Appendix F
[Hearing Report of Administrative Law Judge Molly T. McBride Dated and Filed January 30, 2004]

2. This permit application is for a tidal wetlands permit, protection of waters permit and water quality certificate.

3. Section 661.1 of 6 NYCRR states, in part, "It is the public policy of the State to preserve and protect tidal wetlands, and to prevent their despoliation and destruction, giving due consideration to the reasonable economic and social developments of the State." The Department is entrusted with implementing the state's tidal wetlands policy.

4. Section 661.9(b) of 6 NYCRR identifies the standards for a tidal wetlands permit to be issued. In summary, the applicable standards require a showing that the permitted activity will preserve and protect tidal wetlands, prevent the despoliation and destruction of wetlands, and not have an undue adverse impact on the present or potential value of the wetlands for marine food production, wildlife habitat and flood and hurricane and storm control.

5. Standards for issuance of a water quality certification are found at 6 NYCRR 608.9 and the protection of waters permit issuance standards are found at 6 NYCRR 608.8.

6. Department Staff identified numerous reasons why they need access to applicant's property to conduct the permit application review and why applicant's alternatives are not acceptable. Applicant has not met his burden of proof to show why access to this property is not reasonably

necessary as part of the permit application review. Department Staff provided specific sworn testimony as to why that type of inspection would not be sufficient.

RECOMMENDATION

I recommend that the Commissioner find that applicant has not met his burden of proof to show that Department Staff's request for access to his property as part of its permit application review is not reasonably necessary. Department Staff has indicated that they must deny the permit application because they were denied access to the property. Therefore, I recommend that the Commissioner affirm Staff's denial of the permit application unless Respondent provides Department Staff the necessary access to his property within 20 days of the Commissioner's decision. If applicant provides Department Staff with the necessary access, then I recommend that Staff conduct the site inspection and take the appropriate action on the application.

Appendix G - Ruling of the Commissioner, State of New York, Department of Environmental Conservation, Dated and Filed February 1, 2002 [47a - 50a]

STATE OF NEW YORK
DEPARTMENT OF
ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1010

In the Matter

-of-

the Application for a tidal wetlands permit, pursuant to Environmental Conservation Law of the State of New York ("ECL") Article 25 and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") Part 661 by

PAUL PALMIERI

Applicant

Application No. 1-4720-00666/00009

RULING OF THE COMMISSIONER

February 1, 2002

Appendix G
[Ruling of the Commissioner, State of New York, Department of Environmental Conservation, Dated and Filed February 1, 2002]

Pursuant to 6 NYCRR Part 624.8(b)(i) Staff of the New York State Department of Environmental Conservation ("DEC Staff", "Department") duly served a motion for administrative judicial intervention upon Paul Palmieri (the "Applicant") on or about June 28, 2001. Said motion was supported by the affirmation of assistant regional attorney Craig L. Elgut, Esq. and the affidavit of DEC staff Charles T. Hamilton, Supervisor of Natural Resources, Region One. Applicant opposed said motion by affidavit of Richard Young, Esq., counsel for Applicant.

The motion seeks an Order determining the Applicant's failure to appear for a hearing an abandonment of the hearing process, thereby deeming the applicant's request for a hearing on his tidal wetlands application withdrawn and denying any further administrative remedy. In the alternative, Staff seeks an Order that affirms Staff 's denial of the permit application due to the permit application being incomplete.

Staff documents by affirmation of Craig L. Elgut, Esq. that:

(i) Applicant applied for a tidal wetlands permit to expand a residential dock an additional 50 feet and to add an 80,000 lb. boat lift;

(ii) By letter dated July 7, 2000 DEC Staff denied the application after notifying applicant that

the Staff required access to the site to complete the application review and Staff was denied access;

(iii) Applicant requested a hearing after receipt of the denial;

(iv) An adjudicatory hearing was rescheduled to be held on June 25, 2001.

A copy of the motion and supporting papers and the Applicant's opposing affidavit were filed with the Office of Hearings and Mediation Services. The hearing and the motion were assigned to Administrative Law Judge Molly T. McBride ("ALJ"). Attached to this Ruling is the ALJ's Ruling on Motion and Summary Report, which I adopt as my own, subject to my comments below.

Under the Department's permit processing rules, applicants are required to supply Department Staff with sufficient information to afford Staff a reasonable opportunity to evaluate information in determining whether to approve, modify or deny a request for a Department permit. As set forth in the ALJ's report, applicants must supply this information or otherwise cause their application to be deemed incomplete requiring further information before Staff can make a reasonable determination on the proposed project.

Appendix G
[Ruling of the Commissioner, State of New York, Department of Environmental Conservation, Dated and Filed February 1, 2002]

I find that the Applicant's tidal wetlands application under review must be deemed incomplete for the purposes of permit processing under the Department's Uniform Procedures, 6 NYCRR Part 621. The Applicant's denial of access to his property prevented Department Staff from evaluating the on-site conditions and the proposed project. The ability to gather such information is necessary to make the determination that the permit application is complete. The Applicant's actions effectively relieves Department Staff from taking any further action on the permit application until access to the site and site information is available for Staff's review. Further I am determining that the Applicant's request for hearing on its proposed project is void until such time as the site access and the necessary information is made part of the permit application. Thereafter, if and when said information is supplied and Staff's redetermination is to deny the proposed project, then the Applicant will be afforded a hearing on Staff's denial of the requested permit.

For the New York State Department
of Environmental Conservation

S/_____
By: Erin M. Crotty, Commissioner

Date: Albany, New York
February 1, 2002

Appendix H - Ruling on Motion and Summary Report of Molly McBride (ALJ) [51a - 66a]

STATE OF NEW YORK
DEPARTMENT OF
ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1010

In the Matter

-of-

the Application for a tidal wetlands permit, pursuant to Environmental Conservation Law of the State of New York ("ECL") Article 25 and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") Part 661 by

PAUL PALMIERI

Applicant

Application No. 1-4720-00666/00009

RULING ON MOTION AND SUMMARY REPORT

-BY-

S/_____
Molly McBride
Administrative Law Judge

Appendix H
[Ruling on Motion and Summary Report of Molly McBride (ALJ)]

PROCEDURAL BACKGROUND

Applicant Paul Palmieri ("Applicant") applied to the New York State Department of Environmental Conservation ("'DEC', "Staff", "Department') in May, 1999 for a tidal wetlands permit pursuant to ECL Article 25 and 6 NYCRR 661. The application was denied on July 7, 2000 and Applicant requested an adjudicatory hearing. A hearing was scheduled for March 27, 2001 but was adjourned due to the unavailability of Staff's witness. The hearing was rescheduled for June 25, 2001. Applicant failed to appear for the hearing. DEC Staff served a notice of motion for administrative judicial intervention pursuant to 6 NYCRR 624.8(b)(i) on or about June 28, 2001. DEC Staff submitted the following in Support of the motion: affirmation of assistant regional attorney Craig L. Elgut, Esq. and the affidavit of Charles T. Hamilton, Supervisor of Natural Resources for the DEC, Region One, sworn to on June 28, 2001. Applicant opposed the motion by Affirmation of Richard W. Young, Esq. counsel for Applicant, dated July 9,2001.

Staff's Motion was served on the Office of Hearings and Mediation Services as was Applicant's opposing papers. The hearing and now this motion were assigned to Administrative Law Judge Molly T. McBride ("ALJ").

Staff moves for an order deeming the Applicant's failure to appear at an adjudicatory hearing as an abandonment of the hearing process which in turn deems the

Appendix H
[Ruling on Motion and Summary Report of Molly McBride (ALJ)]

Applicant's request for a hearing withdrawn. In the alternative, Staff seeks an Order that affirms Staffs denial of the permit application.

BACKGROUND

Applicant owns a private residence at 123 East Shore Road, Babylon, New York, on the Great South Bay. This Applicant has a history of filing permit applications with the Department. In 1991 the Applicant applied for a permit to reconstruct a bulkhead and to construct a 30' x 10' ramp and a 5' x 45' float and pilings. The permit was issued. Approximately 5 months later, Applicant applied for a permit to construct a 52' fixed pier with additional pilings. This application was also granted.

One year after the second permit was issued, Applicant sought to expand the exiting 52' pier an additional 110', to add 2 boat lifts with 80,000 lb. and 16,000 lb. capabilities and to add 4 mooring pilings clusters. Staff denied this application. A hearing was requested by the Applicant after the denial. The parties entered into settlement discussions and ultimately resolved the matter. A Stipulation of Settlement was entered into by the parties on May 30, 1995 wherein the Applicant agreed to modify the application and reduce the extension of the boat dock from 110' to 40' and to reduce the boat lift request from two boat lifts to one boat lift. Based upon these changes, Staff withdrew its objections to the issuance of the permit and a permit was issued in June, 1995.

Appendix H
[Ruling on Motion and Summary Report of Molly McBride (ALJ)]

In May, 1999 the Applicant applied for a permit to construct an additional 50' extension of the dock and to add an 80,000 lb. boat lift. This is basically what was requested by the Applicant in his 1995 application, when combined with what was permitted in June, 1995.

The May, 1999 application was denied by Staff by letter dated July 7, 2000. The Notice of Permit Denial states, in part: "You failed to allow Department Staff to inspect your property to observe the conditions at the site in order to determine whether or not your proposal complies with the standards for permit issuance. Therefore, this application for permit is hereby denied." It is undisputed that Applicant has refused Staff access to his property to inspect it as part of the permitting process. Applicant contends that Staff can conduct whatever inspection is necessary from the water, without entering his property.

An adjudicatory hearing was scheduled for March 27, 2001 in Babylon, New York. The hearing was adjourned due to the unavailability of Staffs witness. The parties finally settled on June 25, 2001 as the rescheduled date for the hearing. The ALJ served on both parties by facsimile, a letter dated May 10, 2001 and a Notice of Public Hearing confirming the June 25, 2001 hearing date. The ALJ and Staff appeared at the hearing site on June 25, 2001. Neither the Applicant nor his counsel appeared. Counsel for the Applicant later indicated that he did not believe that a firm date had been set for the hearing.

Appendix H
[Ruling on Motion and Summary Report of Molly McBride (ALJ)]

STAFF'S POSITION

Staff seeks a denial of the application based on Applicant's failure to appear for the hearing and due to the incompleteness of the application. Staff advised Applicant that an inspection of his property, from his property rather than by boat, is essential for the review of the application. Absent the inspection, the permit can not be granted.

APPLICANT'S POSITION

Applicant's counsel's affidavit in opposition to the motion only addresses Staff's request to deny the application based on Applicant's failure to attend the hearing. However, he has addressed the issue of the site inspection in earlier correspondence with the Department. Applicant has denied the DEC all access to his property. He insists that Staff conduct its inspection from the least intrusive manner available that being from the waterway."[1]

FINDINGS OF FACT

After a review of the pleadings and papers submitted herein by the parties, I find that the following facts are not in dispute:

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1. By letter dated April 27, 2000, counsel for the Applicant advised DEC that his client would not consent to an inspection from the property and suggested an inspection from the water.

Appendix H
[Ruling on Motion and Summary Report of Molly McBride (ALJ)]

1. By application dated May 25, 1999 Applicant Paul Palmieri applied for a tidal wetlands permit to construct a 50' extension to an existing pier and to add one boat lift.

2. Staff attempted to inspect Applicant's property in April, 2000 as part of the application review process. Access was denied by the Applicant.

3. By letter dated July 7, 2000 DEC Permit Administrator Mark Carrara advised Applicant's counsel that due to Applicant's failure to allow an inspection from the property, the permit application was being denied.

4. A Notice of Permit Denial was issued to the Applicant by the DEC on July 7, 2000. The Notice stated, in part, "You failed to allow Department staff to inspect the property to observe the conditions at the site in order to determine whether or not your proposal complies with the standards for permit issuance. Therefore, this application for permit is hereby denied."

5. Applicant requested an adjudicatory hearing on the denial of the application.

6. The hearing was scheduled for June 25, 2001 in Babylon, New York. Applicant failed to appear for the hearing.

DISCUSSION

6 NYCRR 624.6(c) allows for the bringing of a motion at any time. Motions made prior to the hearing shall be filed with the ALJ and served on all parties. The ALJ shall then rule upon the motion prior to the completion of testimony. 6 NYCRR 624.8(b)(i) grants the authority to an ALJ to rule upon all motions and requests, including those that decide the ultimate merits of the case.

DISMISSAL DUE TO APPLICANT'S FAILURE TO APPEAR

Staff requests that the Applicant be denied an adjudicatory hearing due to his failure to appear for the hearing scheduled for June 25, 2001. Applicant claims to have not been aware that the hearing was rescheduled. To deny the hearing based upon the Applicant's failure to appear for the hearing is a drastic remedy. While the Notice for the hearing was sent by facsimile by the Office of Hearings to the Applicant's counsel on May 10, 2001, there is no confirmation that counsel saw that letter and Notice. Frankly, scheduling errors occur and such a severe penalty as requested by Staff is not warranted here. Also, Staff has submitted no law in support of the request.

Appendix H
[Ruling on Motion and Summary Report of Molly McBride (ALJ)]

RIGHT TO INSPECT

The application is for a tidal wetlands permit. Tidal wetlands in New York State are regulated by Part 661 of 6 NYCRR. It is the public policy of the State to protect and preserve tidal wetlands and to prevent their despoliation and destruction. Part 661.2(a) states: "Tidal wetlands constitute one of the most vital and productive areas of the natural world and collectively have many values . . . Therefore, the protection and preservation of tidal wetlands is essential." There are five standards that govern whether the Department will issue a tidal wetlands permit. Those standards are defined at 6 NYCRR 661.9(b)(i)-(v).

The Applicant has the burden of establishing that the applicable standards will be met. 6 NYCRR 661.9(a)

In the instant case, the Applicant failed to allow Staff onto his property. Staff notified Applicant in writing that it was a necessary part of the permit process to have access to the property to conduct the inspection. Despite being notified of the Department's need to inspect, the Applicant continued to deny access. As stated, the Applicant has not addressed the issue of an inspection from the property in his opposing papers. However, in April, 2000 Applicant's attorney sent a letter to DEC indicating that his client would not consent to the inspection from his property. Counsel cited 3 cases in support of his position that the inspection from the property was tantamount to an illegal and warrantless search. After reviewing the cases cited, I

disagree. The circumstances of those cases, which I will address below, were significantly different than here and, therefore, the rulings are not controlling here.

The leading case cited by the Applicant is *Sokolov v. Village of Freeport, 52 N.Y.2d 341.* In *Sokolov*, the Court of Appeals held that a Village ordinance that required an inspection of residential rental property in order for the owner to rent out the property was a warrantless search and therefore unconstitutional. The Village had enacted an ordinance requiring all owners of rental property to have a permit issued before renting the property. The permit would only be issued after the Village inspected the property. The Court held "We hold today that the imposition of a penalty upon a landlord for renting his premises without first consenting to a warrentless search violates the property owner's Fourth Amendment rights." (*Sokolov* at 343) The Court noted that if the property owner does not consent. he will he deprived of the economic benefit of his property. Here, the Applicant is seeking a privilege. He is asking to be allowed to construct a pier extension and add a boat lift into the Great South Bay. The issue is, does the construction harm the delicate nature of the tidal wetlands. The DEC is entrusted with the important task of preserving and protecting tidal wetlands. That job requires the Department to carefully review each application for a tidal wetlands permit to ensure that it meets the standards enumerated in part 661. As stated by Charles Hamilton, DEC Region One supervisor of Natural Resources, the Department can not

complete their job without inspecting the property. The suggestion of the Applicant that the inspection take place from the water is not viable. Staff has refuted that in the Hamilton affidavit. First it would be wrong to have the Applicant dictate to Staff how they should do their job. But, more importantly, it is crucial for Staff to have complete access to the wetlands and no other type of inspection will suffice. Staff has been entrusted with the responsibility of ensuring that the existing and potential values of tidal wetlands for marine food production and wildlife habitat and other values associated with tidal wetlands are protected.

The Hamilton affidavit addresses why an inspection from the Applicant's property is a necessary part of this application process. Hamilton asserts that Staff must conduct an extensive site review to assess a specific project and it's specific wetland environment. (Hamilton, p. 2) By denying Staff access, Staff is denied the opportunity to conduct a meaningful technical review of the project site as required by the regulations. (Hamilton, p. 2) , ". . . , staff must access the condition of the wetlands in the area of the existing structure as well as the area where the proposed extension would be located. Staff needs to determine whether the existing structure is causing impacts which may be compounded by increasing the size of the structure." (Hamilton, p. 5) Applicant does not address any of these issues in it's opposing papers. While Applicant's counsel submitted case law that he alleges supports his client's position that an inspection is a warrantless search, he has offered no response to Staffs specific arguments on why they

need to enter the property in this case. Applicant has never stated how Staff can determine if the application meets the standards for permit issuance without actually inspecting the property.

I find staff's arguments persuasive and agree that in order to meet the duties imposed by Part 661, an inspection of the site is necessary.

The Applicant's attorney also cited *Town of Brookhaven v. Ronkoma Realty Corp., 154 A.D. 2d 665, Second Dept:, 1989*. This case also involved an ordinance requiring rental property to be inspected and a permit issued prior to rental. For the same reasons cited in *Sokolov*, the Court found that the ordinance was unconstitutional. Finally, Applicant cited *People v. Ost, 121 A. D. 2d 571*, Second Dept., 1986. In *Ost*, the police had entered the defendant's business, without a warrant, examined his books, without permission, and used the information gathered to charge the defendant criminally. The Court found the warrantless inspection a violation of the defendant's constitutional rights and the charges were dismissed. For obvious reasons the facts in *Ost* can not be equated with the facts here.

One of the differences between a tidal wetlands permit and a permit to operate rental property is that the tidal wetlands permit is asking for a privilege, not a right. There is no right to a tidal wetlands permit. The Applicant here will not lose his property in any way or suffer economic harm if the permit is not granted. There is no monetary or

criminal penalty for him if he fails to allow the inspection. The only consequence is that the application must be denied. The Applicant is still free to enjoy his property as he did before filing the application. He has previously been granted permits to construct the pier, reconstruct the bulkhead and install a boat lift. The pier has already been extended from it's initial 52' to 92'. The Applicant is free to chose [sic.] which route to take. He has elected to refuse Staff access to his property. Surprisingly, the permits previously issued to the Applicant all provide the DEC with the right to enter the property to ensure that the permit conditions are being complied with. All permits issued by the DEC grant the Department that right. Applicant has already consented, by accepting the permits, to Staff entering his property. It is illogical for Applicant to deny access to Staff as a part of this application. However, that is his right.

Staff can not determine if the application meets the standards for permit issuance without inspecting the property. Therefore, the application is incomplete. Staff has no discretion with regards to applying the standards. If it can not be determined that the standards are met, the application simply can not be deemed complete.

DENIAL DUE TO INCOMPLETENESS

Staff argues in it's motion that the application is in fact incomplete due to the lack of an inspection. Staff notified Applicant in writing on April 1, 2000 that it was a

necessary part of the permit process to have access to the property to conduct the inspection. At that time, Mark Carrara, Deputy Permit Administrator for the DEC stated to the Applicant that the permit application would be denied if Staff was not allowed to inspect the property. Despite being notified of the Department's need to inspect, the Applicant continued to deny access.

Clearly, the application can not be reviewed by Staff without the inspection and therefore, the application is in essence incomplete. Staff cites the Interim Decision in *Bath Petroleum Storage, Inc, November 6, 2000* in support of it's argument that the completeness of the application is an issue that is not subject to review.

The Interim Decision, issued by Deputy Commissioner Carl Johnson held that there is a bar against adjudicating the completeness of a permit application in 6 NYCRR section 624.4(c)(7).

> A review of relevant administrative decisions reveal the basis for the bar. The purpose of the prohibition where an application is deemed complete is to give an Applicant comfort and certainty that its application cannot be undone at the hearing stage, i.e., assertions by intervening parties to adjourn the hearing on incompleteness grounds. See, Matter of Applications of Department of Sanitation Southwest Brooklyn Incinerator, Interim Decision, March 2, 1994. ". . . the completeness determination . . . is intended to

reflect the point at which the application contains sufficient information to commence regulatory review." Matter of LaFever Excavating, Inc., Interim Decision, October 28, 1991. ". . . once the completeness determination is made, there is no turning back." Matter of Applications of NYC Department of Environmental Protection, Preliminary Ruling of ALJ, Match 24, 1994; See also, Matter of Applications of Fulton County Board of Supervisors, Decision of Commissioner, February 13, 1987. *Bath* at p.7

I agree with Staff that the application is in fact incomplete when Staff can not access the property. The Applicant bears the burden of showing that the application meets the standards enumerated in Part 661. That burden is met with written submissions AND an inspection of the site. The application information submitted must be field verified. Qualified, trained biologists visit the site to assess the area. A tidal wetlands permit can be issued only if the proposed activity meets the standards for permit issuance in 6 NYCRR 661.9(b)(i)-(v). Nothing in Part 661 gives Staff the discretion to work outside of these standards. Obviously, Staff can not assess whether the standards are met without sending trained professionals to the site to do their job. If Staff can not determine if the standards arc met, Staff can not conduct a complete the [sic.] review of the application.

Appendix H
[Ruling on Motion and Summary Report of Molly McBride (ALJ)]

Based upon the Interim Decision in *Bath*, I have no authority to review Staffs determination that the application is incomplete.

CONCLUSION

Staff has requested that the denial of the application based upon incompleteness be affirmed or in the alternative, the application be dismissed due to the Applicant's failure to attend the hearing. Staff has cited no legal authority to deny the application solely due to Applicant's failure to appear at the hearing. Further, the penalty is too harsh to deny the application when Applicant's attorney claims to not have been aware of the hearing being scheduled. Also, the permit denial issued by the Department was not the proper vehicle in this circumstance. Staff acknowledges that the application is incomplete. Staffs remedy to that particular circumstance is to issue an [sic.] Notice of Incomplete Application rather than a denial of the application based upon incompleteness.

RECOMMENDATION

Based upon the record before me and the Findings of Fact herein, I recommend that the Notice of Denial be vacated and that Staff's determination that the application is incomplete as stated in correspondence to the Applicant and the motions papers herein, be deemed a Notice of Incomplete Application. Further, the Request for Hearing filed by the Applicant is void since such a request can not be made in response to a Notice of Incomplete Application. The

application can not be processed further until such time as it is complete. This Ruling can be referred to the Commissioner for final determination.

Appendix I - Constitutional Provisions, Treaties, Statutes, Ordinances and Regulations [67a - 132a]

The constitutional provision involved is the Fourth Amendment to the U.S. Constitution which provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Statutes involved are:

ECL § 15-0505 entitled "Protection of navigable waters; excavation or fill; permit" provides:

> 1. No person, local public corporation or interstate authority shall excavate or place fill below the mean high water level in any of the navigable waters of the state, or in marshes, estuaries, tidal marshes and wetlands that are adjacent to and contiguous at any point to any of the navigable waters of the state and that are inundated at mean high water level or tide, without a permit issued pursuant to subdivision 3 of this section. For the purposes of this section, fill shall include, but shall not be limited to, earth, clay, silt, sand, gravel, stone, rock, shale, concrete (whole or fragmentary), ashes, cinders, slag, metal, or any other similar material whether or not enclosed or contained by (1) crib work of wood, timber, logs, concrete or

metal, (2) bulkheads and cofferdams of timber sheeting, bracing and piling or steel sheet piling or steel H piling, separated or in combination. Nothing contained in this section is intended to be, nor shall be construed to limit, impair or affect the memorandum of understanding which any state department enters into with the Department of Environmental Conservation or the general powers and duties of the Department of Transportation relating to canals or the general powers and duties of the Department of Environmental Conservation relating to flood control.

ECL §25-0102 entitled "Declaration of policy" provides:

> It is declared to be the public policy of this state to preserve and protect tidal wetlands, and to prevent their despoliation and destruction, giving due consideration to the reasonable economic and social development of the state.

ECL § 25-0404 entitled "Judicial review" provides:

> Any person aggrieved by the issuance, denial, suspension, or revocation of a permit may within thirty days from the date of the commissioner's order seek judicial review pursuant to article seventy-eight of the civil practice law and rules in the supreme court for the county in which the tidal wetlands

affected are located. In the event that the court may find that the determination of the commissioner constitutes the equivalent of a taking without compensation, and the land so regulated otherwise meets the interest and objectives of this act it may, at the election of the commissioner, either set aside the order or require the commissioner to acquire the tidal wetlands or such rights in them as have been taken, proceeding under the power of eminent domain.

ECL §70-0103 entitled "Legislative findings and declarations" provides:

The legislature finds and declares that:

1. It is the intent of the legislature to assure the fair, expeditious and thorough administrative review of regulatory permits.

2. It is the intent of the legislature that, to the extent feasible and appropriate, statutory and regulatory procedures shall be made uniform and inconsistencies and redundancies shall be eliminated.

3. It is the intent of the legislature to establish reasonable time periods for administrative agency action on permits.

4. It is the intent of the legislature to encourage public participation in government review and

decision-making processes and to promote public understanding of all government activities.

5. It is the intent of the legisl ture that, to the maximum extent feasible, a comprehensive project review approach shall replace separate and individual permit application reviews.

ECL §70-0109 entitled "Time periods for department action on permit applications provides:

1. (a) On or before fifteen calendar days after the receipt of an application for a permit which has been filed in a manner and in a form prescribed by the department, the department shall mail written notice to the applicant of its determination whether or not the application is complete.

(b) If the department fails to mail written notice to an applicant of its determination whether or not an application is complete within such fifteen calendar day period, the application shall be deemed complete.

(c) If the department determines the application is not complete, the notice shall include a concise statement of the respects in which the application is incomplete.

d) The resubmission of the application or the submission of such additional information shall commence a new fifteen calendar day period for department review of the additional information for purposes of determining completeness.

(e) If the department determines the application is complete, the notice shall so state.

2. (a) Immediately upon determining that an application is complete, the department shall cause a notice of application to be published in the next available environmental notice bulletin which shall be not later than ten calendar days after the date of such determination and not less than once during the fifteen calendar day period following such determination in a newspaper having general circulation in the area in which the project is proposed to be located, and shall provide notice to the chief executive officer of each municipality in which the proposed project is located, and may direct the applicant to provide such reasonable notice and opportunity for comment to the public as the department deems appropriate. Newspaper publications shall be provided by the applicant.

(b) The time period for public comment on a permit application shall be stated in the notice of application.

3. (a) Within the time periods specified in subparagraphs (i) and (ii) of this subdivision and subject to the provisions of subdivisions four, five and six of this section, the department shall make a decision on an application for a permit by mailing the applicant a permit, a permit with conditions or a statement that the permit applied for has been denied.

(i) In the case of an application for a permit for which no public hearing has been held, such decision shall be mailed on or before ninety calendar days after the department mails written notice to the applicant that the application is complete or on or before ninety calendar days after the application is deemed complete pursuant to the provisions of this article.

(ii) In the case of an application for a permit for which a public hearing has been held, the department shall mail its decision to the applicant and to all parties to the hearing on or before sixty calendar days after receipt by the department of a complete record, as that term is defined in paragraphs (a) through (e) of subdivision one of section three hundred two of the state administrative procedure act.

(b) If the department fails to mail a decision on an application for a permit within the time periods specified, the applicant may cause notice of such failure to be made to the department by means of

certified mail return receipt requested addressed to the commissioner. If, within five working days after the receipt of such notice, the department fails to mail a decision, the application shall be deemed approved and a permit deemed granted subject to any standard terms or conditions applicable to such a permit. However, no permit shall be deemed approved where such permit is issued in lieu of a federal permit pursuant to an authorization granted to the state pursuant to either Public Law 94-580, the "Federal Resource Conservation and Recovery Act of 1976", or Title V of Public Law 101-549, the "Clean Air Act", and where the issuance of a permit in such a manner is contrary to such authorization.

4. The time periods for a department decision on an application for a permit as specified in subdivision three of this section shall be suspended pending receipt by the department of any final environmental impact statement and any explicit findings related to a proposed project as may be required pursuant to article eight (environmental quality review) of this chapter when the department is not the lead agency as that term is used in rules and regulations adopted by the department pursuant to section 8-0113 of said article.

5. The department shall make no decision and no permit shall be deemed granted until the applicant has paid all applicable fees and costs.

6. Any time period specified in this article may be waived and extended for good cause by written request by the applicant with the consent of the department, or by the written request of the commissioner or his designee with the consent of the applicant.

6 NYCRR §608.5 entitled "Excavation or placement of fill in navigable waters" provides:

(a) Permit required. No person, local public corporation or interstate authority may excavate from or place fill, either directly or indirectly, in any of the navigable waters of the state or in marshes, estuaries, tidal marshes and wetlands that are adjacent to an contiguous at any point to any of the navigable waters of the state, and that are inundated at mean high water level or tide, without a permit issued pursuant to this Part.

6 NYCRR §621.1 entitled "Definitions" provided:

(a) *Adjudicatory public hearing* means a trial type proceeding which provides the opportunity for adjudication on the basis of evidence, including direct testimony and cross examination provided under article 3 of the State Administrative Procedure Act, section 70-0109 of the Environmental Conservation Law (ECL), section 621.6 of this Part and Part 624 of this Title.

(b) *Chief permit administrator* means an employee of the department located in the main office of the department and designated to act on the commissioner's behalf in carrying out this Part.

(c) *Commissioner* means the Commissioner of Environmental Conservation, or any employee of the department designated to act on the commissioner's behalf in carrying out this Part.

(d) *Complete application* means an application for a permit which is in an approved form and is determined by the department to be complete for the purpose of commencing review of the application but which may need to be supplemented during the course of review in order to enable the department to make the findings and determinations required by law.

(e) *Delegated permit* means a permit issued by the department for which a comparable permit may be required by Federal law. Delegated permits are issued by the department for the following programs:

(1) Resource Conservation and Recovery Act (RCRA) of 1976, 42 USC 6901 et seq., 1984 (see section 621.16 of this Part) (ECL article 27, title 9) for any hazardous waste management facilities (HWMF) or remedial action plans (RAP) under ECL article 27, title 9 except those limited to the disposal

of waste containing polychlorinated biphenyl (PCB) only.

(2) Clean Water Act (CWA) amendments, 33 USC 1251 et seq., 1987 (see section 621.16 of this Part) (ECL article 17, titles 7 and 8) for any State pollutant discharge elimination systems (SPDES) permit involving an industrial or municipal discharge under ECL article 17, titles 7 and 8.

(3) Clean Air Act (CAA) amendments, 42 USC 7401 et seq., 1990 for any air pollution control source under ECL article 19 subject to the following Federal requirements:

(i) prevention of significant deterioration (PSD);

(ii) new source review in nonattainment areas; or

(iii) title V facility permits.

(f) *Department* means the New York State Department of Environmental Conservation, or a local agency to which the department has delegated permitting or review authority.

(g) *Emergency* means an event which presents an immediate threat to life, health, property, or natural resources.

(h) *ENB (Environmental Notice Bulletin)* means the publication of the department published pursuant to section 3-0306 of the ECL, accessible on the department's Internet web site at http://www.dec.state.ny.us.

(i) *EPA* means the United States Environmental Protection Agency.

(j) *Legislative public hearing* means a proceeding which provides an opportunity for public comment provided by section 621.7 of this Part.

(k) *Local government* means a village, town, city or county.

(l) *Major project* means any action requiring a permit identified in section 621.2 of this Part, which is not specifically defined as minor.

(m) *Minor project* means any action listed as minor in section 621.4 of this Part, subject to the reservations of section 621.3(c)(3) of this Part. All actions identified as Type II in Parts 617 and 618 of this Title are minor. Minor projects are projects which by their nature and with respect to their location are not likely to have a significant effect on the environment.

(n) *Modification* means any change or amendment whatsoever to a permit that is currently in force, including transfer form one person to another.

(o) *Permit* means any permit, certificate, license or other form of department approval, suspension, modification, revocation, renewal, reissuance or recertification, including any permit condition and variance, that is issued in connection with any regulatory program listed in section 621.2 of this Part.

(p) *Person* means any corporation, firm, partnership, association, trust, estate, one or more individuals, any other legal entity or any unit of Federal, State or local government or any agency or subdivision thereof, including any State department, bureau, commission, board or other agency, public authority or public benefit corporation.

(q) *Project* means any action requiring one or more permits identified in section 621.2 of this Part.

(r) *Regional permit administrator* means an employee of the department located in each of the nine regional offices of the department and designated to act on the commissioner's behalf in carrying out this Part.

(s) *Regulatory agency* means the department, another state agency, or a local government having any form of jurisdiction over a project.

(t) *Renewal* means the reissuance, recertification or extension of any permit for previously approved activities which will be continuing on the same site without material change.

(u) *SEQR* means the State Environmental Quality Review Act, article 8 of the Environmental Conservation Law and Parts 617 and 618 of this Title.

(v) *Tentative determination* means a notice of intent to issue or deny a permit.

(w) *Title V facility permit* means a permit, which is issued by the department pursuant to Subpart 201-6 of this Title, for a facility or a defined area source, group, or category of emission units at a facility.
(x) *Variance* means relief from the provisions of specific permit program implementing regulations as provided herein.

6 NYCRR § 621.3 entitled "General requirements for applications" provided:

Following are general requirements for all applications for permits covered by this Part.

Appendix I
[Constitutional Provisions, Treaties, Statutes, Ordinances and Regulations]

Additional specific requirements for individual permits are given in section 621.4 of this Part. Copies of forms, regulations and guidelines referred to in this Part are available from the department's regional permit administrators at the locations listed in Appendix 1 of this Title, infra.

(a) *General requirements for complete application.* In order to be determined complete for the purpose of commencing department review, the application for a permit listed in section 621.2 of this Part must meet the requirements specifically listed in section 621.4 of this Part as well as the following criteria:

(1) The application must include a properly completed department application form, supporting documentation, and supplemental information as required by the specific program implementing regulations and this Part. Engineers certifying documents must be licensed in New York State.

(2) The department may request information concerning the applicant which is reasonably necessary to determine who may be a responsible party for compliance with the conditions of the permit, the ECL, or for remediation of any environmental degradation and in order to help determine the appropriate financial security which may be required. Any false written statements

knowingly made are punishable pursuant to Penal Law, section 210.45.

(3) If a project requires more than one department permit, the applicant must simultaneously submit all the necessary applications, or demonstrate to the department's satisfaction that there is good cause not to do so.

(4) If variances from permit standards are sought and are provided for in specific regulatory program implementing regulations, then the application must include a request and justification for such variances.

(5) When a project also requires related permits from any other agency or government, the department application must include a list of such permits which the applicant knows to be required, and a statement of the status of approval and SEQR review of each at the time of filing the department applications.

(6) If a project is subject to the provisions of article 8 of the Environmental Conservation Law (SEQR), the department must satisfy the requirements of Part 617 of this Title. An application is not complete until a properly completed environmental assessment form has been submitted and:

(i) a lead agency has been established pursuant to article 8 of the Environmental Conservation Law; and

(ii) a negative declaration, or conditioned negative declaration has been filed pursuant to article 8 of the Environmental Conservation Law; or

(iii) if it has been determined that the project may have a significant effect on the environment, a draft environmental impact statement (DEIS) has been accepted by the lead agency; and

(iv) where the department, as the lead agency, requires the preparation of a DEIS by an applicant, the scoping, review and acceptance of that applicant-prepared document are considered prerequisites to a determination of complete application. Accordingly, the department may either solicit written public comment or conduct a public scoping meeting to determine the range of issues that must be addressed in the DEIS. Where written public comment or public meeting is necessary, it shall be commenced no later than 30 calendar days following the SEQR determination of significance.

(7) When section 14.09 of the Parks, Recreation and Historic Preservation Law (New York State Historic Preservation Act of 1980) requires that the department obtain a determination by the Office of Parks, Recreation and Historic Preservation on the impact of a project on properties listed or eligible for listing on the State Register of Historic Places, the

application is not complete until that determination has been made.

(8) If a project is located in a coastal area designated according to article 42 of the Executive Law and 19 NYCRR Part 600, the application is not complete until sufficient information has been provided to enable the department to complete a coastal assessment form as prescribed by the Secretary of State.

(9) A project located within the Adirondack Park may also require permits from the Adirondack Park Agency and/or the New York State Department of Health, as well as from the department. In such a case, the application for a department permit shall not be considered complete until the applicant has submitted to all agencies complete applications for all required permits, and SEQR requirements of all other agencies are fulfilled, or until the applicant demonstrates good cause not to do so.

(10) For further information concerning completeness, see section 621.5 of this Part; and for further completeness criteria for particular permits covered by this Part, see section 621.4.

(b) *General conditions regarding fees.* Nothing in this Part limits the department's right to charge fees under SEQR for the preparation or review of the

environmental impact statements. (See section 617.17 and Part 618 of this Title.)

(c) *General conditions regarding minor projects.*

(1) The department has identified certain activities as minor, as listed in section 621.4 of this Part. Minor projects usually have an insignificant environmental impact. However, it is necessary to regulate such activities due to the potential for abuse of natural resources, the necessity for monitoring related activities, and the possible cumulative effect of minor actions which individually are environmentally insignificant.

(2) Minor projects are not normally subject to the public notice requirements of section 621.6 of this Part, and may be processed faster than major projects as explained in section 621.9.

(3) If it is determined that a minor project may have a significant effect on the environment under SEQR or requires a public hearing, the project will thereafter be processed as a major project for purposes of this Part.

(4) When a project involves simultaneous permit application for both major and minor activities, all are processed as major for purposes of this Part.

(5) When a project involves simultaneous permit applications for multiple activities, all of which are minor, all are processed as minor for purposes this Part unless it is determined that the project may have a significant effect under SEQR.

(d) Where a project involves permits both subject and not subject to this Part, the department reserves the right to process all such applications pursuant to this Part.

(e) *Joint proceedings.* In some instances, government agencies other than the department may have concurrent jurisdiction over an application for a permit under this Part. The commissioner may enter into agreements with such agencies for joint processing of the application, including provision for joint notices and hearings. The department may require the applicant to provide a copy of the permit application directly to another government agency to facilitate joint processing.

(f) *Enforcement actions.* Processing and review of an application may be suspended with written notice to the applicant if an enforcement action has been or is commenced against the applicant for alleged violations of law related to the activity for which the permit is sought or for alleged violations of the ECL related to the facility or site. Such suspension of processing and review may remain in effect pending

final resolution of the enforcement action. This provision does not relieve the department from the requirement to make a final decision on title V facility permit applications within 18 months of the date that the application was complete pursuant to title V of the CAA and this Part.

6 NYCRR § 621.4 entitled :Requirements for specific permit applications" provides:

> The requirements in this section for specific permits include additional information to be furnished for the department to determine that the application is complete. Supplemental information that the department determines is necessary to review the application may be requested at any time. Procedures to be followed when reviewing an application for a permit depend upon whether a project is considered major or minor. A list of specific actions considered either major or minor is included in this section for each permit type. For each permit type where a maximum permit term is established by statute or regulation the maximum permit term is provided at the end of the relevant subdivision of this section. Implementing regulations have been promulgated by the department for most activities; in some cases interpretive guidelines have also been issued. Regulations cited in the subdivisions below should be consulted for supplemental requirements when preparing a permit

application. They are available from the regional permit administrators at the locations listed in section 621.19 of this Part, or from the department's Internet website at: http://www.dec.state.ny.us.

(a) Use and Protection of Waters, Permits under Part 608 of this Title, article 15 title 5 of the ECL:

(i) A complete application must include a properly completed joint application for permit form, plan and profile sketches of the proposed project and a map at a scale of 1" = 2,000' (1 cm = 240 m) or larger showing its location.

(ii) Minor stream bed or bank disturbance actions include the following: repair or in-kind replacement of existing structures; disturbances of less than 100 linear feet (30.48 linear meters) along any 1,000 feet (304.8 meters) of watercourse.

(2) Construction or repair of dams.

(i) A complete application must include a properly completed joint application for permit and supplemental forms and the information specified in the permit program implementing regulations.

(ii) Minor dam projects include only repairs of existing dams inventoried by the department.

(3) Construction, reconstruction and expansion of piers, wharfs, platforms, breakwaters, docking facilities and the placement of moorings.

(i) A complete application must include a properly completed joint application for permit and supplemental forms, plan and profile sketches of the proposed project, and a map at a scale of 1" = 2,000' (1 cm = 240 m) or larger showing the project location. For docking or mooring facilities the applicant must submit a plan drawn to scale depicting structures, and where appropriate, delineated facility perimeters that include a reference point to a permanent structure or significant natural feature.

(ii) Minor dock and mooring projects include:

(a) construction or installation of docks, piers, wharfs or other structures used solely as a landing place, providing dockage for 10 or fewer boats and encompassing within a facility perimeter an area of 8,000 square feet or less;

(b) the in-kind replacement of a structure on open supports;

(c) establishing a mooring facility for 20 or fewer boats.

(4) Excavation or placement of fill in navigable waters.

(i) A complete application must include a properly completed joint application for permit form, plan and profile sketches of the proposed project, a map at a scale of 1" = 2,000' (1 cm = 240 m) or larger showing its location, and must identify the means and location of dredged material disposal.

(ii) Minor excavation or placement of fill projects include: fill of less than 100 cubic yards; maintenance dredging occurring at least once every 10 years; excavation or placement of fill of 5,000 square feet or less; riprap of less than 100 linear feet for each parcel of land; repair or replacement in-kind and in-place of existing structures.

(b) Water Supply and Long Island Wells, permits under Parts 601 and 602 of this Title, article 15 title 15 of the ECL:

(1) A complete application must include a properly completed joint application for permit and supplemental forms and all exhibits listed in Part 601 of this Title.

(i) extension of a water district or other service area to an existing facility, or a proposed facility having all required approvals from involved regulatory

entities where present sources of supply are adequate to serve the proposed extension area and where the additional area does not exceed 50 percent of the size of the previously approved area;

(ii) replacement of a well with an equivalent well in the same aquifer having a capacity not more than 110 percent of the original;

(iii) changes in ownership of a water supply system, including acquisitions of private systems by a town or county water district;

(iv) enlargement of existing facilities involving an increase of not more than 45 gallons per minute for groundwater sources and not more than 150 gallons per minute for surface sources, or 10 percent of the original capacity, whichever is greater; and

(v) acquisition and use, in an existing approved system, of a supplemental supply taken from another approved system having a demonstrated surplus.

(3) Minor Long Island well projects include:

(i) a well used solely for cooling purposes where all water pumped will be recharged within 50 vertical feet of the taking point, and no SPDES permit is required;

(ii) temporary dewatering systems withdrawing less than one million gallons per day;

(iii) permanent dewatering systems, providing all water pumped is completely recharged within 50 vertical feet of the taking point and no SPDES permit is required;

(iv) a well with a permanently installed pump, to be used for fire protection purposes only;

(v) acquisition and use, in an existing approved system, of a supplemental supply from another approved system having a demonstrated surplus supply; and

(vi) replacement of a well with an equivalent well in the same aquifer having a capacity not more than 110 percent of the original.

(4) Permit term: The maximum permit term for permits identified in this subdivision is:

(i) 10 years for approved groundwater sources on Long Island; or

(ii) an indefinite term for all other approvals.

(c) Transportation of water by Vessel, permits under article 15 title 15 of the ECL:

Appendix I
[Constitutional Provisions, Treaties, Statutes, Ordinances and Regulations]

(1) A complete application must be accompanied by any supplemental information which the department notifies the applicant is necessary to review the application. Details are available from department staff at the locations listed in Appendix 1 of this Title, infra.

(d) Wild, Scenic and Recreational Rivers, (except river areas on private land in the Adirondack Park which are subject to 9 NYCRR Part 577), permits under *6 NYCRR Part 666* of this Title, article 15 title 27 of the ECL:

(1) A complete application must include a properly completed joint application for permit and supplemental forms, a map at a scale of 1" = 2,000' (1 cm = 240 m) or larger showing the project location and the boundary of the river area, and upon notification by the department, any other supplemental information that the department determines is necessary to review the application.

(2) Minor rivers system projects include: subdivisions creating not more than two lots; construction of single-family dwellings in subdivisions approved pursuant to Part 666 of this Title or on lots that otherwise conform to the restrictions of Part 666 of this title; and construction of accessory structures or signs.

(3) Permit term: The maximum permit term for permits identified in this subdivision is 5 years.

(e) Water Quality Certifications in accordance with section 401 of the Clean Water Act, (see section 608.9(c) of this Title) and Part 608 of this Title:

(1) A complete application for a Water Quality Certification must include either:

(i) a written request for the Water Quality Certification; or

(ii) a properly completed joint application for permit form.

(2) The department may also request a properly completed application and supporting documentation for any required federal permits or licenses.

(3) If permits are required from the department for the activity the application must include properly completed applications.

(4) Minor 401 certification projects include those which will not exceed the minor project thresholds established in this Part for protection of waters, freshwater wetlands or tidal wetlands, and which do not involve the approval of construction and operation of hydroelectric generating facilities.

(5) Permit Term: The maximum permit term will be concurrent with the permit term for the accompanying permit issued pursuant to any program administered under this Part or the term of a license or other authorization issued by a federal agency.

(f) State Pollutant Discharge Elimination System (SPDES), permits under Part 750 of this Title, article 17 titles 7 and 8 of the ECL:

(1) A complete application must include properly completed application forms, a location map or plan at a scale of 1" = 2,000' (1 cm = 240 m) or larger showing the point of discharge into the receiving waters, and any other supplemental information which the department determines is necessary to review the application.

(2) Minor SPDES projects include:

(i) discharges of less than 10,000 gallons per day of sewage effluent, without the admixture of industrial wastes or other wastes, to groundwaters; and

(ii) ballast discharges.

(3) Permit Term: For delegated permits a maximum of 5 years. For non-delegated permits a maximum of 10 years.

(g) Air Pollution Control, permits under Parts 201, 203, 215 and 231 of this Title, article 19 of the ECL:
(1) A complete application must include information specified in Part 201 of this Title, and other applicable air pollution control regulations.

(2) The types of projects described in subparagraphs (i) - (ix), that follow, are major; all others are minor:

(i) projects subject to the Title V facility permit requirements under Part 201 of this Title including: initial permitting of subject facilities, permit renewals and significant permit modifications;

(ii) projects involving any preconstruction permit for construction and initial operation of new emission sources at Title V permitted facilities that are defined as significant permit modifications pursuant to Section 201-6.7(d) of this Title;

(iii) projects subject to major new source preconstruction permitting under Part 231 of this Title (Nonattainment Areas) or the federal Prevention of Significant Deterioration regulations under *40 CFR 52.21* (Attainment Areas, see Part 200 of this Title);

(iv) projects requiring emission reduction credits;

(v) projects requiring the use of a federally enforceable emission cap:

(a) to avoid major stationary source classification as defined in Part 201 of this Title; or

(b) to avoid more stringent emission controls that would otherwise be required for projects described under subparagraph (ii) above.

(vi) projects involving emission sources subject to National Emission Standards for Hazardous Air Pollutants under 40 CFR 61, except for emission sources subject to 40 CFR Part 61 Subpart M - National Emission Standards for Hazardous Air Pollutants for Asbestos, Section 61.145, Standards for Demolition and Renovation (see Table 3 in Part 200 of this Title);

(vii) projects involving the construction of new facilities with emission sources subject to National Emission Standards for Hazardous Air Pollutants under 40 CFR Part 63 (See Table 4 in Part 200 of this Title);

(viii) projects subject to title IV requirements under the CAA (see section 200 of this Title); and

(ix) projects involving the construction of new highways or roads, or modification of any existing

section of highway or road, which require an indirect source permit under Part 203 of this Title.

(3) Permit term: The maximum permit term for permits identified in this subdivision:

(i) Five years (5) for Title IV and Title V facility permits.

(ii) An indefinite term for state facility permits.

(h) Liquefied Natural Gas and Petroleum Gas Facilities (LNG/LPG), permits under article 23 title 17 of the ECL:

(1) There are no minor LNG/LPG projects.

(2) Permit term: The maximum permit term for permits identified in this subdivision is 10 years.

(i) Mined Land Reclamation, permits under Parts 420 - 425 of this Title, and article 23 title 27 of the ECL:

(1) A complete application must include a:

(i) complete mining permit application;

(ii) complete organizational report;

(ii) mined land-use plan;

(iii) statement by the applicant that mining is not prohibited at that location; and

(iv) such additional information as the department may require.

(2) Minor mining projects are those which meet all of the following criteria:

(i) total acreage affected by mining for entire mining site is less than five acres regardless of length of mining period;

(ii) total depth of mine from floor to top of mine face is less than 20 feet;

(iii) any on-site processing of mining products consists of only those activities that are exempt from air contamination source permits pursuant to section 201-3.2(c)(28) and (29) of this Title;

(iv) there is no mining within 100 feet of any surface waters;

(v) there is no mining of consolidated minerals;

(vi) there is no mining within 500 feet of any dwelling; and

(vii) there is no mining below the water table at the mine site.

(3) Permit term: The maximum permit term for permits identified in this subdivision is 5 years.

(j) Freshwater Wetlands, permits under Part 663 of this Title, and article 24 of the ECL:

(1) A complete application must include a properly completed joint application for permit for, plans and profile sketches of the proposed project, and a map at a scale of 1" = 2,000' (1 cm = 240 m) or larger showing the project's location and, if determined necessary, a wetland delineation approved by the department.

(2) Minor freshwater wetlands projects include:

(i) In-kind and in-place replacement of existing functional bulkheads and similar structures.

(ii) Restoring, reconstructing, or modifying existing functional structures or facilities, excluding drainage ditches, that involves a temporary disturbance of less than 50 square meters (approximately 540 square feet,) of ground surface.

(iii) Removing or breaching a nuisance beaver dam, in conjunction with a nuisance beaver permit issued

pursuant to article 11 of the ECL, in order to restore water levels in a wetland. The beaver dam must have been constructed within the current growing season.

(iv) Constructing a driveway in the adjacent area of a wetland to an existing residence.

(v) Filling for dikes or berms, excavations or other activities associated with a wetland or riparian restoration project authorized, designed or undertaken by the USDA Natural Resources Conservation Service, USDI Fish and Wildlife Service, US Army Corps of Engineers or the department.

(vi) Filling for dikes or berms, excavations and other activities associated with an approved wetland mitigation project required by the US Army Corps of Engineers, the USDA Natural Resources Conservation Service, or the department.

(vii) Cutting but not elimination or destruction of vegetation, such that the functions and benefits of the wetland are not significantly adversely affected.

(viii) Dredging less than 523 cubic yards (400 cubic meters) to maintain present navigational channels.

(ix) Drilling a water well to serve an individual residence.

(x) Drilling test wells for sampling and scientific studies but not for mineral exploration.

(xi) Installing a dock, pier, wharf or other structure built on floats or open-work supports and having a top surface area of approximately 200 square feet (20 square meters) or less.

(xii) Installing electric, telephone or other utilities from an existing utility distribution facility to a structure, where no major modifications or construction activities in the wetland are necessary.

(xiii) Building a deck adjoining an existing dwelling within an adjacent area.

(xiv) Routine beach regrading and cleaning.

(xv) Intensive, organized and repetitive use of all-terrain vehicles, air and motor boats, and snowmobiles in the adjacent area.

(xvi) Clear cutting timber in the adjacent area.

(xvii) Installing utility service to an individual residence.

(xviii) Application of a pesticide in an adjacent area conducted pursuant to a permit issued under article

15 of the ECL and Parts 327, 328, and 329 of this Title.

(xix) Application of a pesticide to the grounds of a private residence by the owner.

(xx) Installation of fencing in an adjacent area.

(xxi) Constructing, in an adjacent area, farm ponds that do not require a permit pursuant to Part 608 of this title.

(xxii) Permanent filling of amounts of material not to exceed 1,150 cubic feet, associated with the restoration of an existing functional structure in the adjacent area of a wetland.

(xxiii) Placing a non-commercial structure, no larger than 576 square feet (53.51 square meters) gross floor area and no closer than 25 feet (7.62 meters) from the wetland boundary, proximate to an existing single family residence in the adjacent area of a wetland.

(k) Tidal Wetlands, permits under Part 661 of this Title and article 25 of the ECL:

(1) A complete application must include:

(i) properly completed joint application for permit form;

(ii) plan and profile sketches of the proposed project;

(iii) a map at a scale of 1" = 2,000' or larger showing its location;

(iv) project plans at a scale of 1" = 100' (1 cm = 12 m) with a contour interval of two feet (.609 meter) and showing the mean high water line (if the project is in the water) and/or the tidal wetlands boundary as delineated at the site by department staff or an environmental consultant, or an accurate representation of the tidal wetland boundary as taken from the official tidal wetlands maps;

(v) a description of the project including its proposed use;

(vi) the names of adjacent landowners;

(vii) a statement of feasible alternatives; and

(viii) a statement of methods to mitigate or eliminate adverse impacts to tidal wetlands.

(2) Minor tidal wetland projects include any activity given a designation of GCp - Generally Compatible Use - Permit Required in Part 661 of this Title.

(3) Permit term: The maximum permit term for permits identified in this subdivision is 10 years.

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(l) Waste Transporter and Low Level Radioactive Waste (LLRW Transporter, permits under Parts 364 and 381 of this Title, and article 27 title 3 of the ECL:

(1) A complete application for industrial and low level radioactive waste collection must include details of specific waste characteristics and other supplemental information which the department notifies the applicant is necessary to review the application.

(2) All transportation projects are minor.

(3) Permit term: The maximum permit term for permits identified in this subdivision is 1 year.

(m) Solid Waste Management Facilities (SWMF), permits under Part 360 of this Title, and article 27 title 7 of the ECL:

(1) A complete application for a solid waste management facility permit must include properly completed application forms, a map at a scale of 1" = 2,000' (1 cm = 240 m) or larger showing the project location, plans, reports and other supporting information required by Part 360 of this Title. If the facility is to be constructed in stages, the initial application must contain the conceptual design for the entire facility and detailed construction plans for the initial stage.

(2) Minor solid waste management facility projects include:

(i) landfills used exclusively for disposal of construction and demolition debris that are three acres or less in size;

(ii) yard waste composting facilities;

(iii) transfer stations receiving less than 50,000 cubic yards or 12,500 tons of solid waste annually; and

(iv) construction of subsequent stages of a solid waste management facility, when:

(a) the facility was previously approved to be constructed in stages; and

(b) the environmental impacts associated with the entire facility including the specific proposed stage, were previously addressed in accordance with SEQR.

(3) Permit term: The maximum permit term for permits identified in this subdivision is 10 years.

(n) Hazardous Waste Management Facilities (HWMF), permits under Part 373 of this Title, and article 27 title 9 of the ECL:

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(1) A complete application for construction or operation or construction and operation of a hazardous waste management facility must include:

(i) property completed application forms;

(ii) plans, reports and supporting information required by Part 373 of this title;

(iii) other supplemental information which the department notifies the applicant is necessary to review the application; and

(iv) expanded public participation documentation, in compliance with Subpart 373-1 of this Title, for new hazardous waste management units or major modifications of existing permits.

(2) There are not minor hazardous waste management facility projects.

(3) Permit term: The maximum permit term:

(i) not to exceed 5 years for land disposal and incinerators; or

(ii) not to exceed 10 years for all other hazardous waste facilities.

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(o) Siting of Industrial Hazardous Waste Facilities, permits under Part 361 of this Title, and article 27 title 11 of the ECL:

(1) A Part 361 application accompanies a hazardous waste management facility application (Part 373 application) and in order to be complete must include plans, report, draft environmental impact statement and supporting information required by Part 361 of this Title, as well as any supplemental information which the department notifies the applicant is necessary to review the application.

(2) There are no minor projects under Part 361 of this Title.

(p) Coastal Erosion Management, permits under Part 505 of this Title, and article 34 of the ECL:

(1) A complete application must include a properly completed joint application for permit form, be accompanied by plans, supporting documentation required by Part 505 of this Title and any other supplemental information which the department notifies the applicant is necessary to review the application.

(2) At the request of an applicant, the department shall coordinate and consolidate its application review procedures with any other such procedures

required by any other federal, state or local agency into a single, comprehensive review and hearing procedure to the extent practicable to comply with *ECL section 34-0107(6)*.

(3) The following are minor projects: excavation, grading, mining, filling or dredging of less than 100 cubic yards; construction or modification of docks, piers, or wharves not on fill; construction or modification of erosion protection structures not exceeding 100 linear feet.

(q) Radiation Control, permits under *6 NYCRR Part 380* and articles 1, 3, 17, 19, and 27 of the ECL:

(1) A complete application for a Part 380 permit must include information specified in section 380-3.2.

(2) The following types of projects are minor; all others are major:

(i) the discharge of licensed radioactive material to the environment in effluents to the air or water at concentrations less than the effluent concentration values listed in Table II of section 380-11.7;

(ii) the discharge of licensed radioactive material to the environment in effluents to the air or water at concentrations greater than the effluent concentration

values listed in Table II of section 380-11.7 and for which the potential total effective dose equivalent to any individual member of the public does not exceed 10 millirem per year; and

(iii) the use of licensed radioactive material in the environment to conduct an environmental study for which the potential total effective dose equivalent to an individual member of the public does not exceed 10 millirem per year.

(3) Permit term: The maximum permit term for permits identified in this subdivision is 5 years.

6 NYCRR § 621.5 entitled "Department action on applications" provided:

(a) Applications shall be submitted to the appropriate regional permit administrator, as listed in Appendix 1, for determination of completeness and review.

(b) The department shall mail notice of its determination of completeness or incompleteness to the applicant:

(1) for delegated permits: on or before 60 calendar days after receipt of the application, except for minor modifications to title V facility permits as described in Part 201 of this Title which shall follow the timeframe under paragraph (2) of this subdivision;

(2) for all other permits: on or before 15 calendar days after receipt of the application; and

(3) for projects requiring both delegated and nondelegated permits: on or before 60 calendar days after receipt of the application.

(c) If the application is determined to be incomplete, the notice shall include a brief statement indicating all identified areas of incompleteness. Nothing herein shall preclude the department from requesting additional information in accordance with section 621.15(b) of this Part.

(d) If the application is determined to be complete and is for a major project, the notice will state:

(1) The applicant's name.

(2) A brief description of the proposed project and its location.

(3) A list of all department permits for the project for which application has been made, and identification numbers for those applications.

(4) The name and telephone number of the department representative and, where applicable, of any lead agency representative to contact for further information.

(5) The status of environmental reviews conducted under SEQR, including identification of lead agency, positive or negative determination of significance, and whether the action is Type I, unlisted, Type II, exempt, or excluded, as defined in Part 617 or 618 of this Title.

(6) The deadline (not less than 15 calendar days after the date of publication) for submission of written comments on the application including any request for a public hearing, and the deadline (not less than 30 calendar days after publication) for submission of comments on the draft environmental impact statement if one has been prepared and accepted. For delegated permits, the deadline for submission of written comments is as follows:

(i) SPDES and air pollution control permits: 30 days after the date of publication of the notice required by this Part;

(ii) HWMF permits or RAPs: 45 days after the date of publication of the notice required by this Part.

(7) For delegated permits, the tentative determination and the availability of either the draft permit or notice of intent to deny:

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(i) If the tentative determination is to issue the permit, then the department will prepare and issue a draft permit containing the following information:
(a) for SPDES, information required to be in permits as provided in Parts 750-758 of this Title;

(b) for HWMF, information required under section 373-1.4(d) or for RAPs set forth in section 373-1.11(d)(2) of this Title; and

(c) for air pollution control, information required under 40 CFR 52.21 for prevention of significant deterioration (see Part 200 of this Title) and Part 201 of this Title for projects subject to title V facility permit requirements.

(ii) If the determination is to deny the permit, then the department shall issue a notice of intent to deny.

(iii) If, after issuing a notice of intent to deny a permit, the department makes a determination, based on additional information or further consideration, that a permit may be issued, the department may upon the applicant's consent:

(a) withdraw the notice of intent to deny;

(b) issue a draft permit; and

(c) provide public notice of the intent to issue a permit in accordance with this Part.

(8) For delegated permits, the notice of complete application will serve as a fact sheet for projects or facilities on a list agreed to by the department and the U.S. Environmental Protection Agency or which the department finds are the subject of widespread public interest or raise substantive and significant issues. The notice of complete application shall include the information required under section 753.3 of this Title for SPDES permits, Part 373 of this Title for HWMF permits or RAP permits and for air pollution control permits subject to Subpart 231-2 of this Title, the notice must state that information regarding the demonstration of the Lowest Achievable Emission Rate (LAER) is available in the regional office and may be reviewed upon request.

(9) For title V facility permits, the notice of complete application must state that the EPA has the authority to bar issuance of the subject permit (see Part 201 of this Title).

(e) If the application is determined to be complete and for a minor project, the notice shall contain:

(1) information required by paragraphs (1)-(5) of subdivision (d) of this section; and

(2) a statement that the application is for a minor project.

(f) If the department fails to mail notice of its determination of completeness or incompleteness to the applicant within the time limit specified above, the application shall be deemed complete. Nothing herein shall be deemed to waive any applicable statutory requirements of article 8 of the ECL (SEQR), article 14 of PRHPL (New York State Historic Preservation Act of 1980) or preclude the department from requesting additional information in accordance with section 621.15(b) of this Part.

(g) If an application is resubmitted, a new completeness review period of 15 days (60 days for delegated permits and those projects requiring both delegated and nondelegated permits) shall commence from the date of receipt by the department.

6 NYCRR §621.7 entitled "Determination to conduct a public hearing" provided:

(a) After a permit application for a major project is complete (see provisions of sections 621.3 through 621.5 of this Part), and notice in accordance with section 621.6 of this Part has been provided, the department shall evaluate the application and any comments received on it to determine whether a

public hearing will be held. If a public hearing must be held, the applicant and all persons who have filed comments shall be notified by mail. This shall be done within 60 calendar days of the date the application is complete. A public hearing may be either adjudicatory or legislative.

(b) The determination to hold an adjudicatory public hearing shall be based on whether the department's review raises substantive and significant issues relating to any findings or determinations the department is required to make pursuant to the Environmental Conservation Law, including the reasonable likelihood that a permit applied for will be denied or can be granted only with major modifications to the project because the project, as proposed, may not meet statutory or regulatory criteria or standards. In addition, where any comments received from members of the public or other interested parties raise substantive and significant issues relating to the application, and resolution of any such issue may result in denial of the permit application, or the imposition of significant conditions thereon, the department shall hold an adjudicatory public hearing on the application.

(c) Regardless of whether the department holds an adjudicatory public hearing, a determination to hold a

legislative public hearing shall be based on the following:

(1) if a significant degree of public interest exists;

(2) to fulfill the requirements of section 617.8 of this Title; or

(3) for HWMF permits or RAPs, if notification of opposition to a draft permit or RAP, and a request for a hearing is received during the public comment period.

(d) Mere expressions of general opposition to a project are insufficient grounds for holding an adjudicatory public hearing on a permit application. In order to raise substantive and significant issues, written comments expressing objection or opposition to an application must explain the basis of that opposition and identify the specific grounds which could lead the department to deny or impose significant conditions on the permit.

(e) The department normally does not require public hearings in connection with applications for minor projects, as identified in sections 621.3 and 621.4 of this Part. If a public hearing is required for a minor project, the application shall be treated as a major project for purposes of this Part.

(f) If a permit for a project is denied, or is issued with significant conditions attached and an adjudicatory public hearing was not held, then the applicant may request that one be held. Such a request must be made within 30 calendar days of the date of the mailing of either the notice of denial or the permit with conditions. The hearing shall commence within 45 calendar days of the date of receipt of the request.

(g) If a public hearing on an application is required to be held, it shall commence on or before 90 calendar days after the date the application is complete.

(h) The public adjudicatory hearing will be held according to the provisions of Part 624 of this Title.

6 NYCRR § 621.9 entitled "Final decisions on applications" provided:

(a) The department or its agent shall mail to the applicant and its representative, if applicable, a decision in the form of: a permit, a permit with conditions or a statement that the permit applied for has been denied, with an explanation for the denial. This must be done within the following time periods:

(1) for a minor project for which no adjudicatory public hearing has been held: on or before 45

calendar days after the date the application was complete. If the permit applied for has been denied or is issued with significant conditions attached, then the decision notification shall include an opportunity for an adjudicatory hearing to be held. The applicant may, within 30 calendar days of the date of the mailing of either the notice of denial or the permit with conditions, request a hearing which the department shall commence within 45 calendar days of receiving the request;

(2) for a major project for which no public hearing has been held: on or before 90 calendar days after the date the application was complete. If the permit applied for has been denied or is issued with significant conditions attached, the notifications will state that the applicant has the right to an adjudicatory hearing. The applicant may, within 30 calendar days of the date of the mailing of either the notice of denial or the permit with conditions, request a hearing which the department must commence within 45 calendar days of receiving the request;

(3) for any application for which a public hearing has been held on or before 60 calendar days after the receipt by the department of the complete hearing record; and

(4) for a project which a lead agency has determined may have a significant effect on the environment for

the purposes of SEQR, and for which the department is not the lead agency: the time periods specified in this Part shall be suspended not less than 35 days prior to the date on which a final decision is required pursuant to this Part, pending receipt from the lead agency of either a final environmental impact statement, or a determination of nonsignificance. Upon receipt of these materials the time periods shall resume.

(5) Notwithstanding the time periods established in paragraphs (2) and (3) of this subdivision, for applications for title V facility permits, the department may not issue a final decision unless the EPA has been provided 45 calendar days to review any responsiveness summary and the resultant draft permit issued by the department in accordance with subdivision (e) of this section. The public may petition the EPA to object to the issuance of the draft permit and the EPA may bar issuance of the draft permit (see Part 201 of this Title).

(b) If the department or its agent fails to mail a decision within the time periods specified above, the applicant may make notice of that failure, by means of certified mail, return receipt requested, addressed to the Commissioner of Environmental Conservation, attention: Chief Permit Administrator, New York State Department of Environmental Conservation, Division of Regulatory Affairs, 625 Broadway,

Albany, NY 12233. If authority to issue and deny permits has been delegated by the commissioner to another agency, notice shall also be made to the chief executive of such agency. Such notice shall contain the applicant's name, location of the proposed project, the office in which the application was filed, if applicable, the identification number assigned to the application in any notice of complete application and a statement that a decision is sought according to this subdivision or ECL 70-0109(3)(b). Any notice failing to provide this information will not invoke this provision.

(c) If the department or its agent fails to mail the decision to the applicant within five working days of the receipt of such notice, the application will be deemed approved and the permit deemed granted, subject to the standard terms or conditions applicable to such a permit. The provisions of this subdivision do not apply to:

(1) delegated HWMF permits OR RAPs; and

(2) title V facility permits, unless the department has satisfied all requirements established under this Part and Part 201 of this Title regarding notice and opportunity for review of draft permits by EPA, affected states and the public.

(d) Notwithstanding the time periods for decisions specified above, the department or its agent shall not be required to issue a decision on an application, nor shall an application be deemed approved, until the applicant has provided satisfactory proof of any public notice required, posted any bonds required, and paid all fees or costs assessed by the department.

(e) For delegated permits, the department will issue a responsiveness summary to relevant comments relating to such permits which were received during the public comment period or during any hearing. For title V facility permits, the responsiveness summary must be issued within 60 days of the date the application is complete, except when a hearing is required. The provisions of this paragraph are not applicable to permits for which a final environmental impact statement otherwise satisfying the requirements of this subdivision has been prepared pursuant to section 617.8 of this Title or those for which an adjudicatory public hearing has been held. The responsiveness summary must also contain the following information:

(1) identification of any conditions in the final permit that are different from the conditions in the draft permit, and the reasons for the changes;

(2) for title V facility permits, the responsiveness summary must also reference the procedures

contained in Part 201 of this Title that the public must follow if they elect to petition the EPA to object to the issuance of the proposed permit.

(f) An application for a permit may be denied for failure to meet any of the standards or criteria applicable under any statute or regulation pursuant to which the permit is sought, including applicable findings required by article 8 of the ECL or for any of the reasons set forth in section 621.14(a)(1)-(5) of this Part.

6 NYCRR § 621.15 entitled "Special provisions" provided:

(a) Any time period specified in this Part may be extended for good cause, by mutual written consent of the applicant and the department. The EPA must be notified in those cases where a proposed extension will exceed the time periods established in Federal regulation. This provision does not supersede the requirement that the public can request judicial review in State court if a title V permit is not issued within 18 months of the date that an application is complete.

(b) At any time during the review of an application for a new permit, modification, or renewal, the department may request in writing any additional information which is reasonably necessary to make

any findings or determinations required by law. Such a request shall be explicit, and shall indicate the reasonable date by which the department is to receive the information. Failure to provide such information by the date specified in the request may be grounds for denial of the application.

(c) The department may issue general permits to allow work to eliminate damage caused by natural disasters or extraordinary weather not unique to a particular locality, including repair or replacement in location and in kind of facilities which existed prior to the damage. Processing of such permits need not follow the full procedural requirements of this Part.

(d) General permits may also be issued by the department for projects that are determined not to have a significant impact on the environment, and that have been subjected to the full procedural requirements of this Part for major projects. General permits under the SPDES program and the air pollution control program in accordance with Part 201 of this Title may be issued for regulated activities for which the department determines that all the requirements of this subdivision have been met.

(e) The department may require as a condition to a permit, and prior to commencement of work, that the permittee post a bond or other financial assurance acceptable to the department of specified amount

with the department. This is to ensure faithful compliance with the terms of the permit, and is used for the indemnification of the State for any costs which might result from failure to so comply. The bond or other financial assurance shall remain in effect until the work is completed to the satisfaction of the department.

(f) Where this Part requires exchange of written materials within specified time periods, postmark dates shall satisfy the requirements, when not otherwise specifically provided.

(g) The department may issue a research, development, and demonstration permit for any hazardous waste treatment facility which proposes to utilize an innovative and experimental hazardous waste treatment technology or process for which permit standards have not been promulgated under section 373-1.9 of this Title. This permit must include terms and conditions to assure protection of human health and the environment.

(1) Variances from permit application and issuance requirements of this Part may be granted by the department, except there may be no variance from any provisions requiring public participation.

(2) Such permits may be issued for a period not to exceed one year and may not be renewed more than

three times, with each renewal period not to exceed one year. Experimental permits may be revoked when it is determined by the department to be necessary to protect human health and the environment.
(3) These permit applications are subject to all other procedural requirements of this Part.

6 NYCRR § 661.1 entitled "Purpose of this Part" provides:

> It is the public policy of the State, as set forth in the Tidal Wetlands Act, to preserve and protect tidal wetlands, and to prevent their despoliation and destruction, giving due consideration to the reasonable economic and social development of the State. It is the purpose of this Part to implement that policy by establishing regulations that allow only those uses of tidal wetlands and areas adjacent thereto that are compatible with the preservation, protection and enhancement of the present and potential values of tidal wetlands (including but not limited to their value for marine food production, wildlife habitat, flood and hurricane and storm control, recreation, cleansing ecosystems, absorption of silt and organic material, education and research, and open space and aesthetic appreciation), that will protect the public health and welfare, and that will be consistent with the reasonable economic and social development of the State.

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6 NYCRR § 661.9 entitled "Standards for issuance of permits" provides:

> (a) Burden of proof. The applicant shall have the burden of establishing that the applicable standards of this section will be met.
>
> (b) Standards for permits on any tidal wetland.
>
> (1) Overall standards. The department shall issue a permit for a proposed regulated activity on any tidal wetland only if it is determined that the proposed activity:
>
> (i) is compatible with the policy of the act to preserve and protect tidal wetlands and to prevent their despoliation and destruction in that such regulated activity is will not have an undue adverse impact on the present or potential value of the affected tidal wetland area or adjoining or nearby tidal wetland areas for marine food production, wildlife habitat, flood and hurricane and storm control, cleansing ecosystems, absorption of silt and organic material, recreation, education, research, or open space and aesthetic appreciation, as more particularly set forth in the findings in section 661.2 of this Part, taking into account the social and economic benefits which may be derived from the proposed activity;

(ii) is compatible with the public health and welfare;

(iii) is reasonable and necessary, taking into account such factors as reasonable alternatives to the proposed regulated activity and the degree to which the activity requires water access or is water dependent;

(iv) complies with the development restrictions contained in section 661.6 of this Part; and

(v) complies with the use guidelines contained in section 661.5 of this Part. If a proposed regulated activity is a presumptively incompatible use under such section, there shall be a presumption that the proposed regulated activity may not be undertaken in the subject area because it is not compatible with the area involved or with the preservation, protection or enhancement of the present or potential values of tidal wetlands if undertaken in that area. The applicant shall have the burden of overcoming such presumption and demonstrating that the proposed activity will be compatible with the area involved and with the preservation, protection and enhancement of the present and potential values of tidal wetlands. If a use is a type of use listed as an incompatible use in the use guidelines for the area involved, it shall not be undertaken on that area.

(2) Formerly connected tidal wetland. In addition to the standards contained in paragraph (1) of this subdivision, the department shall issue a permit for a regulated activity on a formerly connected tidal wetland only if it is determined that the proposed activity will be consistent with the possible future restoration of any portion of the tidal wetland adjoining or surrounding the project site to its original condition.

(c) Standards for permits on adjacent areas. The department shall issue a permit for a proposed regulated activity on an adjacent area only if it is determined that the proposed regulated activity:

(1) is compatible with the public health and welfare;

(2) complies with the development restrictions contained in section 661.6 of this Part;

(3) will not have an undue adverse impact on the present or potential value of any adjacent or nearby tidal wetland for marine food production, wildlife habitat, flood and hurricane and storm control, cleansing ecosystems, absorption of silt and organic material, recreation, education, research or open space and aesthetic appreciation, taking into account the social and economic benefits which may be derived from the proposed activity; and

(4) complies with the use guidelines contained in section 661.5 of this Part. If a proposed activity is a presumptively incompatible use for adjacent areas under such section, there shall be a presumption that the proposed activity may not be undertaken on the adjacent area because it is not compatible with the preservation, protection, or enhancement of the present and potential values of tidal wetlands if undertaken in that area. The applicant shall have the burden of overcoming such presumption and demonstrating that the proposed regulated activity will be compatible with the preservation, protection and enhancement of the present and potential values of tidal wetlands. If a use is a type of use listed as an incompatible use, it shall not be undertaken on such adjacent area.

(d) Notice of acquisition. Written notice by the department to an applicant proposing a regulated activity, or written notice to the department from the State or any agency or subdivision thereof, that the State or any such agency or subdivision is in the process of acquiring the tidal wetland or adjacent area on which the proposed regulated activity would be located by negotiation or condemnation shall be sufficient basis for denial of a permit for such regulated activity. Such notice may be provided at any time prior to the department's decision to issue or deny a permit for a regulated activity.

(e) In determining whether the standards contained in subdivisions (b) and (c) of this section will be fulfilled by a proposed regulated activity, the department may in its discretion consider any proposal made by the applicant in his application to enhance the existing values served by a wetland on or in the vicinity of the site of the proposed regulated activity or to create and sustain new wetland values in or in the vicinity of the site of the proposed regulated activity, provided such proposal relates to an area that is or will be regulated under this Part.

(f) In any case in which an activity is specified as a use not requiring a permit (NPN) under section 661.5 of this Part but requires a permit pursuant to title 5 of article 15 of the Environmental Conservation Law, the standards of this Part will be applied in the department's review of such activity under article 15.

6 NYCRR § 661.12 entitled "Application for a permit" provides:

(a) (1) An application for a permit shall be filed by the applicant with the regional permit administrator on a form prescribed by the department. Such application shall set forth the purpose, character and extent of the proposed regulated activity and shall set forth with particularity the reasons the applicant seeks a permit. The application shall include a detailed description of the regulated activity; a map showing

the area of tidal wetland or adjacent area directly affected, with the location of the proposed regulated activity thereon; a statement as to feasible alternatives to the proposed activity on a site that is not a tidal wetland or adjacent area or by means that do not affect tidal wetlands; a statement identifying the owner of the subject property and, where applicable, written permission of said owner for the applicant to seek permission for, and to carry out, the proposed activity; a description of the planned use of the subject property once the proposed regulated activity is completed; a plan at 1" = 50' scale with a two-foot contour interval and a representation of both the tidal wetlands landward boundary and the mean high water line; a statement of the methods to be employed to eliminate or mitigate environmental impacts; clearly labeled photographs of the site; a variance request when applicable; and such additional information as the regional permit administrator deems sufficient to enable the department to make the findings and determinations required under this Part.

(2) The application shall be accompanied by a list of the names of the owners of record of lands adjacent to the tidal wetland or adjacent area upon which the regulated activity is to be undertaken and the names of known claimants of water rights, of whom the applicant has notice, which relate to any land within, or within 300 feet of the boundary of, the property on which the proposed regulated activity is located.

(3) An application shall not be deemed to be received until the regional permit administrator determines that all such information, including any additional information requested, has been supplied in a complete and satisfactory form.

(4) The department shall mail a copy of the application to the chief administrative officer, or his designee, of each municipality in which the affected tidal wetland or adjacent area, or portion thereof, is located.

(5) The department shall make the application, including all documents and maps associated with it, available for public inspection at the regional office within whose jurisdiction the affected tidal wetland or adjacent area is located and at such other locations as may be designated in the notice of hearing. The department may require the applicant to provide a reasonable number of copies of the application, including associated documents and maps, for this purpose.

(b) The regional permit administrator may, on request of the applicant or on his own motion, treat the application as a request for a determination that the proposed project is an action which does not require a permit under this Part.